(1)

No. 90-6113-CSY
Status: GRANTED

Title: Randall D. White, Petitioner
v.
Illinois

Docketed:
October 31, 1990

Court: Appellate Court of Illinois,
Fourth District

See also:
90-1136

Counsel for petitioner: Peterson,Gary

Counsel for respondent: Anderson,Arleen C., Anderson,Arleen C.

Entry	Date	Note	Proceedings and Orders
1	Oct 31 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Dec 6 1990		DISTRIBUTED. January 4, 1991
4	Dec 22 1990	P	Response requested -- SOC. (Due January 21, 1991)
5	Feb 13 1991		Brief of respondent Illinois in opposition filed.
6	Feb 21 1991		REDISTRIBUTED. March 15, 1991
7	Apr 10 1991		REDISTRIBUTED. April 26, 1991
9	Apr 29 1991		Petition GRANTED.
			**********
10	May 30 1991		Joint appendix filed.
11	Jun 7 1991		Brief of petitioner Randall White filed.
16	Jun 13 1991		Brief amicus curiae of Natl.Assn.of Criminal Defense Lawyers filed.
12	Jun 21 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Jun 28 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
15	Jul 1 1991		Order extending time to file brief of respondent on the merits until July 26, 1991.
17	Jul 18 1991		Order further extending time to file brief of respondent on the merits until July 31, 1991.
18	Jul 26 1991		Brief amicus curiae of New York Society for the Prevention of Cruelty to Children filed.
19	Jul 26 1991		Brief amicus curiae of City of New York filed.
22	Jul 30 1991		Brief amici curiae of Victim Assistance Center, et al. filed.
20	Jul 31 1991		Brief amicus curiae of United States filed.
21	Jul 31 1991		Brief of respondent Illinois filed.
25	Jul 31 1991	X	Brief amici curiae of California, et al. filed.
23	Aug 19 1991		Record filed.
		*	Appellate Court of IL-10 vol.
24	Aug 21 1991		CIRCULATED.
26	Sep 5 1991		SET FOR ARGUMENT TUESDAY, NOVEMBER 5, 1991. (1ST CASE)
27	Oct 2 1991	X	Reply brief of petitioner Randall White filed.
28	Nov 5 1991		ARGUED.

90-6113

NO. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RANDALL D. WHITE, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

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PETITION FOR WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

QUESTION PRESENTED FOR REVIEW

Whether certiorari should be granted to resolve an issue left open in Idaho v. Wright concerning whether the Confrontation Clause requires the prosecution to show that a child witness is unavailable to testify before the child's out-of-court declarations are admitted against a criminal defendant at trial.

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PETITION FOR WRIT OF CERTIORARI

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FOURTH JUDICIAL DISTRICT

Petitioner Randall White respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Fourth Judicial District, entered in the above-entitled proceedings on June 18, 1990.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District appears at 198 Ill.App.3d 641, 555 N.E.2d 1241 (4th Dist. 1990). A copy of the slip opinion is attached to this petition as Appendix A.

The order of the Supreme Court of Illinois denying leave to appeal, entered October 3, 1990, is not reported and is attached as Appendix B.

JURISDICTION

The judgment of the Appellate Court of Illinois, Fourth Judicial District, was entered on June 15, 1990. (Appendix A) A petition for leave to appeal was denied by the Illinois Supreme Court on October 3, 1990. (Appendix B) This petition is being filed within ninety days of the Illinois Supreme Court's denial of leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTION PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...

The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty or property without due process of law...

STATEMENT OF THE CASE

Randall White was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint. He was sentenced to concurrent terms of ten years imprisonment for aggravated criminal sexual assault, six years imprisonment for residential burglary, and two years imprisonment for unlawful restraint.

Mr. White's convictions were affirmed on direct appeal in an opinion reported at 198 Ill.App.3d 641, 555 N.E.2d 1241 (4th Dist. 1990). The opinion sets forth the facts applicable to the trial by jury.

Among the arguments advanced on direct appeal was that Mr. White was denied his constitutional right to confront the witnesses against him where the prosecution's evidence consisted solely of testimony relating the out-of-court statements of the complaining witness and the prosecution neither produced the declarant for cross-examination nor established that she was unavailable to testify. In rejecting this claim, the Illinois Appellate Court held that the question of unavailability "is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule." (Slip Opinion at 31)

The Illinois Supreme Court denied leave to appeal.

REASON FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE LEFT OPEN IN IDAHO V. WRIGHT CONCERNING WHETHER THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO SHOW THAT A CHILD WITNESS IS UNAVAILABLE TO TESTIFY BEFORE THE CHILD'S OUT-OF-COURT DECLARATIONS ARE ADMITTED AGAINST A CRIMINAL DEFENDANT AT TRIAL.

The defendant's conviction for aggravated criminal sexual assault was premised solely upon the out-of-court declarations of a child. Although the four-year-old witness was present in the courtroom, she did not testify and there was no showing that she was unavailable. In upholding the defendant's conviction over a Confrontation Clause challenge, the Illinois Appellate Court, after noting that "it is necessary that we be clear and emphatic on this point," held:

> Whether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule.
>
> People v. White, Slip opinion at 31.

The foregoing holding appears to be in direct and irreconcilable conflict with Ohio v. Roberts, 448 U.S. 56 (1980), wherein this Court held that:

> In the usual case ... the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
>
> 448 U.S. at 65.

The foregoing language from Roberts has prompted many courts to conclude that a demonstration of the declarant's unavailability is a constitutional pre-condition to the admission of most hearsay statements. See United States v. Coputo, 758 F.2d 944, 950 N.1 (3d

Cir. 1985) (collecting cases). However, the Illinois Court characterized the "unavailability doctrine" of Roberts as the "'Sistine Chapel of obiter dicta" and concluded that the "broad based 'unavailability' discussion of Roberts" was "repeatedly repudiate[d]" by United States v. Inadi, 475 U.S. 387 (1987) (holding that a showing of unavailability is not required as a condition to the admission of the out-of-court statements of a non-testifying co-conspirator). (Slip Opinion at 31, 34; emphasis original). The Illinois Court reached this conclusion pursuant to a lengthy analysis wherein it forthrightly recognized that "the decisions of other courts have not give full effect to Inadi's repudiation of the dicta in Roberts." (Slip Opinion at 31)

The Illinois Court explained that it was "necessary that we be clear and emphatic in our holding on this point," and reject the Roberts "unavailability doctrine" in the strongest of terms, "[b]ecause of the uncertainty that Roberts caused regarding the application of exceptions to the hearsay rule." (Slip Opinion at 31) The Illinois Court cited numerous state and federal decisions which have struggled with the application of Roberts, especially in light of this Court's subsequent decision in Inadi. For instance, it has been noted that:

> The Inadi decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements.
>
> Nelson v. Farrey, 874 F.2d 1222, 1231 (Flaum, J., concurring).

This uncertainty is exemplified by the Court of Appeals decision in Nelson wherein the majority, "disavow[ing] any suggestion that Roberts had stated a general rule," concluded:

> At present, then, there is no single authoritative criterion for when the admission of hearsay evidence violates a defendant's constitutional right to confrontation.
>
> Nelson v. Farrey, 874 F.2d at 1227. '

However, Justice Flaum disagreed:

> ... Inadi does not represent a repudiation of Roberts' unavailability discussion. Rather, I believe that Inadi merely reaffirms and applies the Roberts' principle that a showing of unavailability is not required in all situations.
>
> Nelson v. Farray, 874 F.2d at 1231 (Flaum, J., concurring).

Recently, in Idaho v. Wright, ___ U.S. ___, 47 Cr. 2250, 2252 (6/27/90), released a mere two weeks after the Illinois Court's decision in the instant case, this Court reiterated that:

> In Ohio v. Roberts, we set forth "a general approach" for determining when incriminating statements admissible under an exception or exemption to the hearsay rule also meet the requirements of the Confrontation Clause. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay."
>
> "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."
>
> Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.'"
>
> (Emphasis added).

However, since Wright dealt with only the second prong of the Roberts' test, the "unavailability" language must again be considered dicta. In fact, the Wright court specifically noted:

> Applying the Roberts approach to this case, we first note that this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial - and, if so, what that showing requires.
>
> The trial court in this case found that respondent's younger daughter was incapable of communicating with the jury, and defense counsel agreed.
>
> Idaho v. Wright, 47 Crl. at 2252.

Unlike Wright, in this case there was no showing by the prosecution, or finding by the court, that the child witness was unavailable to testify. In fact, the child witness was brought to the courtroom for the purpose of testifying, but the prosecution elected not to put her on the stand.

Justice Harlan once cautioned that:

> There is no reason in fairness why a State should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available.
>
> California v. Green, 399 U.S. 149, 187 (1970) (Harlan concurring).

Accordingly, since there was no showing of unavailability in this case, fairness dictates that the defendant should have been given an opportunity to cross-examine his accuser. The Illinois Court's affirmance of the defendant's conviction under these circumstances appears to violate Confrontation Clause guarantees yet the defendant is effectively precluded from relief so long as the

Roberts' "unavailability doctrine" can be so readily dismissed as "the 'Sistine Chapel' of obiter dicta." (Slip Opinion at 31)

Therefore, due to the confusion engendered by Roberts and its progeny, it is respectfully requested that this Court grant certiorari and resolve the question of whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that the child witness is unavailable at trial.

CONCLUSION

It is respectfully requested that this Court grant certiorari to review the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX A

NO. 4-88-0954

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
JUN 15 1990
Clerk of the
Appellate Court, 4th Dist.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RANDALL D. WHITE, Defendant-Appellant.	)	Appeal from Circuit Court County of Vermilion No. 88CF80
	)	Honorable John P. O'Rourke, Judge Presiding.

JUSTICE STEIGMANN delivered the opinion of the court:

After a jury trial, defendant, Randall White, was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint (Ill. Rev. Stat. 1987, ch. 38, pars. 12-14, 19-3, 10-3). On appeal, defendant contends that the admission of testimony containing certain out-of-court statements by the alleged victim was error. Defendant also argues that if his convictions are affirmed, the case should be remanded for resentencing because the trial court permitted the State to present inadmissible evidence regarding defendant's alleged criminal behavior as a factor in aggravation.

We affirm.

The four-year-old alleged victim, S.G., did not testify at trial. Instead, five witnesses were permitted by the court to

testify as to statements made to them by S.G. Those witnesses were Tony DeVore, S.G.'s baby-sitter; Tammy Grigsby, S.G.'s mother; police officer Terry Lewis; nurse Cheryl Reents; and Dr. Michael Meinzen. The testimony of each of these witnesses will be discussed in detail, as will the circumstances under which S.G. spoke to each witness.

The events relevant to the offenses charged occurred on April 16, 1988, at 4 a.m. in the home of S.G., while Tony DeVore was baby-sitting for S.G. and S.G.'s three-year-old brother, Eric. DeVore, who was fourteen, was awakened by S.G.'s scream, went to the victim's bedroom, and saw the defendant exit that room and then the residence.

At trial, DeVore testified that she asked S.G. what happened, and S.G. told her. Defense counsel's objection to DeVore's testifying as to what S.G. told her was overruled on the ground that S.G.'s statements were spontaneous declarations and therefore admissible as an exception to the rule against hearsay. DeVore's testimony continued as follows:

> "Q. [By prosecutor:] Okay. What did [S.G.] say at that point?
>
> A. When I went in there she said he put his hand over her mouth. He'd been choking her. And she told me that he was touching her in the wrong places and he also said that if she screamed then he would whip her and then call me up there to whip her.

Q. Okay. Now, as best you recall what did [S.G.] say he or did she identify the person or what?

A. She said--well, first she said his name, Randy.

Q. Okay.

A. And then she went on with he.

Q. Okay. Start off with Randy?

A. Yeah.

Q. Okay. Now, you said--you testified that she said he touched her in wrong places. How did she phrase that as best you recall?

A. She said--she said, 'He was touching me.' And when I asked where she point [sic] to her private places.

Q. Okay. And [I] ask you could you describe where she pointed?

A. To the lower part of her body.

Q. Okay. And--[.]

[The defendant's continuing hearsay objection was overruled.]

Q. Do you know the name for the portion of the anatomy for what you talked about?

A. Yes, I do.

Q. What was she pointing to?

A. The vaginal area."

DeVore testified that after she tried to comfort S.G., "she finally calmed down and she quit crying a little bit."

According to DeVore, Tammy Grigsby, the victim's mother, arrived home approximately 30 minutes after the incident. DeVore spoke very briefly to Grigsby, who then sat with S.G. and asked her exactly what happened. Defense counsel's objection to Grigsby's testifying about what S.G. told her was overruled for the same reason that the objection as to DeVore's testimony was overruled. Grigsby testified that S.G.'s response to her question was as follows:

> "A. She said she woke up and that Randy was in the room. And that he had put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony [DeVore] would whip her too. And then she said that he put his mouth on her front part.
>
> * * *
>
> Q. [By prosecutor:] And did you clarify what she meant by that?
>
> A. What do you mean? I--yeah, I asked her exactly, you know, what he did. And she told me that he had pulled her pants down a little bit and put his mouth down there and--."

Grigsby described her daughter as appearing scared and a "little hyper." Grigsby testified that she noticed "bruises or red

marks" on S.G.'s neck that were not present when Grigsby left the residence earlier that evening.

Immediately after this short conversation with her daughter, Grigsby called the police. She testified that Officer Terry Lewis of the Georgetown Police Department arrived "just a few minutes" after she called. Lewis testified that he arrived at S.G.'s home around 4:47 a.m. He asked to speak to S.G. privately, and Grigsby had no objection. Grigsby testified that at the suggestion of Officer Lewis, she checked S.G.'s "front part" (the term Grigsby said S.G. uses for this part of her body), and Grigsby noticed that it was a "little red."

Lewis questioned S.G. by herself in the kitchen. He first spoke with S.G. about cartoons in order to "[get] her at ease." At first she seemed upset and nervous, although she was very cooperative. The officer's testimony as to what the victim told him was essentially identical to the testimony given by DeVore and Grigsby, with the addition of the following:

"A. She went on and she started talking about her pants being wet.

Q. [By prosecutor:] Okay.

A. And when I referred to them as pants she advised me they were not pants they are underwear. And that they were wet. I asked if she had peed in her pants and she got disgusted with me and said, 'I don't pee in my pants, my underwear' she said.

Q. Uh-huh.

A. And she said Randy done it. So I asked her then I said how did Randy make them wet. And she told me that he had pulled her pants to one side and used his tongue on her private parts, what she called her private parts."

Defendant objected to all of Lewis' testimony about what S.G. had told him, but the court overruled that objection, indicating that this testimony was also being admitted as a spontaneous declaration.

Lewis also testified that he noticed a "small cluster of scratches" on the right side of S.G.'s mouth. They appeared to be "very fresh cuts." He said S.G. also had two long, parallel, fresh scratches on the left side of her neck. She told Lewis that "Randy" had done that to her when he had his hand on her. Lewis took a color Polaroid photograph of S.G. around 6 a.m. Lewis testified that the photograph showed the scratches he testified about. The photograph was admitted into evidence.

Cheryl Reents testified that she was working as an emergency room nurse when she interviewed S.G. shortly after 8 a.m. that same morning, April 16, 1988. Reents testified that she asked questions of S.G. in order to obtain a history to assist herself and the attending emergency room physician in making a diagnosis and providing treatment. When the State asked Reents what S.G. told her after Reents asked S.G. what happened, defense counsel again objected. In response, the State argued that S.G.'s statements to Reents were admissible both as

spontaneous declarations as well as statements made for medical purposes under section 115-13 of the Code of Criminal Procedure of 1963 (Code) (Ill. Rev. Stat. 1987, ch. 38, par. 115-13). The court overruled the objection, and Reents testified that S.G. told her, inter alia, the following:

> "A. Okay. Then I asked if he touched her anywhere else [besides her mouth and neck]. And she said yes. And I asked her where. And she said, 'On my front part.' And then for clarification I asked her to point where. And the patient pointed to the mons area.
>
> Q. [By prosecutor:] Okay. And that's what?
>
> A. That's the genital, the labia majora and the surrounding tissue in the genital area.
>
> Q. On the female?
>
> A. Yes, on the female. Okay. And I--then I, for more clarification, I asked her what he touched her with. And she stated his mouth. And then I asked her if he touched her with anything else. She said no. Then I asked her if he touched her with his front part and she stated no. I asked her if he touched her back--her back part. And she said no. And then I asked her if he made her touch him. She said no. Then I asked her if he made her put her mouth anywhere. She said no. And then I asked if anything was put inside of her. She said no. And I asked if it had ever happened before and she said yes when it was cold out.
>
> Q. Okay.
>
> A. And then she continued to say that he put his mouth on her, but he didn't hurt her that time."

Initially, S.G. would not look at Reents, but instead looked down at her ID bracelet as she twisted the bracelet around her wrist. Later, S.G. was cooperative and answered Reents' questions. Reents testified that in questioning S.G., Reents phrased her questions "very open ended to just let [S.G.] just say whatever." Reents also noticed some bruising on the left side of S.G.'s neck.

Dr. Michael Meinzen testified that he was the physician on duty at the hospital emergency room to which S.G. was brought. Meinzen said he spoke with S.G. shortly after 8 a.m. in order to obtain a history from the patient for the purposes of making a diagnosis and treating her medically if that was needed. Meinzen attached great importance to obtaining a history from a patient, noting that, "in medicine we're taught that 90 percent of our diagnosis is based on the history. You listen to what the person tells you and then decide where to go from there, what areas to focus on."

Meinzen was asked to testify about what S.G. had told him, and defense counsel objected. The State again urged two separate grounds for the admissibility of this testimony--spontaneous declaration and section 115-13 of the Code--and the court overruled the objection.

Meinzen then testified that after S.G. told him "Randy" awakened her, she told him the following:

> "A. *** [W]e asked her to direct attention to what--where was it that she was touched. She said he put his hands over her mouth and on her neck. And asked what else happened. And she said that he put his mouth down there. We tried to get her to be more specific. And asked her to point and touch where exactly he had placed his mouth. And she pointed in the--in the area of her external genitalia.
>
> Q. [By prosecutor:] All right.
>
> A. At that point asked her was she hurt anywhere. And she didn't state that she was in any pain at that particular time. She was rubbing an area on her neck that initially then we directed her attention elsewhere and she didn't seem to be holding that area too much more. Specific questions then that we asked was she hurting anywhere in her genital area. And breaking it down you know into children's terms pointing and asking her specifically where she pee-pee and where she pointed was she hurting anywhere there. And she said no that she wasn't. We asked had anything put in they're [sic]. Had he put any finger in or any other things.' She said that nothing had been pushed into her. And we encourage her to identify her anatomy a little bit more so we knew what we were talking about.
>
> Q. Okay.
>
> A. Then asked her a lot of these questions were asked very slowly to make sure that she understood what we were talking about. And, you know, case was such she just said that only that he placed his mouth over her external genitalia and just pointed in that general region. We asked whether she had had to touch him anywhere. Whether she had to place her mouth or anything on any of his parts. And she said that she had not."

The physician described S.G. as "calm and comfortable" when he spoke to her.

As stated earlier, the alleged victim, S.G., did not testify. The entire State's case consisted essentially of the testimony of the witnesses as described earlier in this opinion. Defendant's challenge to the admissibility of their testimony

concerning what S.G. told them requires us to consider, in turn, three separate evidentiary issues: (1) spontaneous declarations; (2) statements to medical personnel under section 115-13 of the Code; and (3) the claim that these hearsay exceptions are invalid unless the prosecution produces the declarant for cross-examination or demonstrates that the declarant is unavailable.

I. SPONTANEOUS DECLARATIONS AS AN EXCEPTION TO THE HEARSAY RULE

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible as a hearsay exception. (M. Graham, Cleary & Graham's Handbook of Illinois Evidence §803.3, at 550 (4th ed. 1984).) This "spontaneous declaration" exception to the hearsay rule was explained by the Illinois Supreme Court in People v. Poland (1961), 22 Ill. 2d 175, 174 N.E.2d 804, where the court stated the following:

> "There has emerged, as a recognized exception to the hearsay rule, the principle that, under certain conditions, what have been variously characterized as 'spontaneous declarations' or 'excited utterances' are properly admissible as an exception to the hearsay rule. Perhaps the classic statement of the reason underlying this exception is that of Wigmore (6 Wigmore, Evidence, 3d ed., sec. 1747):
>
> 'This general principle is based upon the experience that, under certain external

> circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.'
>
> The rule has been succinctly stated by the Supreme Court of California: 'When a declaration is made under the immediate influence of the occurrence to which it relates and so near in time as to negative any probability of fabrication, said declaration is admissible.' Showalter v. Western

Pacific Railroad Co.[,] 16 Cal.2d 460, 106 P.2d 895, 899.

Three factors are necessary to bring a statement within this exception to the hearsay rule: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence. (6 Wigmore, Evidence, 3d ed. sec. 1950; Cleary, Handbook of Illinois Evidence, sec. 13.28)." Poland, 22 Ill. 2d at 180-81, 174 N.E.2d at 806-07.

The Illinois Supreme Court recently had occasion to consider the spontaneous declaration exception to the hearsay rule in a case similar to this one. In People v. Nevitt (Mar. 29, 1990, Docket No. 67756), Ill. 2d , N.E.2d , the supreme court reviewed a case in which the defendant was convicted of aggravated criminal sexual assault upon a three-year-old child, J.B. As stated by the supreme court, one of the issues before it was "whether an interval of as much as five hours between an alleged incident of sexual abuse and a three-year-old child's out-of-court declaration to his mother concerning the alleged incident precludes the statement's admission under the excited utterance exception to the hearsay rule despite other indicia of reliability[.]" Nevitt (Mar. 29, 1990, Docket No. 67756, slip op. at 1), Ill. 2d at , N.E.2d at .

In Nevitt, J.B.'s mother gave J.B. his customary morning bath before taking him to his day-care and educational center for the day. While bathing J.B., his mother checked him from head to toe, including his genital area, for diseases, scratches, and sores, but found nothing out of the ordinary. His mother testified that on arrival at the day-care center, she escorted her son to his classroom and placed his hand in the hand of the defendant, Nevitt.

When she picked up her son at approximately 3 p.m. that same day, he appeared withdrawn. He did not come up to greet her, nor did he say anything to her on their trip home. After arriving at home, J.B. did not eat his afternoon snack with his usual enthusiasm. His mother asked him what was wrong. J.B. blurted out, "'Teacher Tony bit my dingdong.'" (Nevitt (Mar. 29, 1990, Docket No. 67756, slip op. at 2), Ill 2d at , N.E.2d at .) J.B. then demonstrated with an object what had occurred earlier that day.

J.B.'s mother then summoned her mother, who resided in a downstairs apartment. Both women then inspected J.B.'s penis and noted "'a pinkish coloration around the head'" about the size of a dime. (Nevitt (Mar. 29, 1990, Docket No. 67756, slip op. at 2), Ill 2d at , N.E.2d at .) When the grandmother touched the boys penis, he "hollered 'ouch' and 'it's sore.'" Nevitt (Mar. 29, 1990, Docket No. 67756, slip op. at 2), Ill. 2d at , N.E.2d at .

Based upon the testimony of J.B.'s mother concerning what J.B. told her, as well as other evidence presented by the

State, including defendant's written admission to performing the acts in question, Nevitt was convicted. The appellate court reversed his conviction and remanded for a new trial, finding that the prosecution failed to provide a proper foundation for J.B.'s mother's identification of defendant as "Teacher Tony." (People v. Nevitt (1988), 174 Ill. App. 3d 926, 528 N.E.2d 307.) Because of this lack of foundation, the appellate court held that J.B.'s out-of-court statement to his mother was inadmissible.

The State appealed that decision and the defendant requested cross-relief from the supreme court. Defendant argued that both the trial and appellate courts erred when they found that J.B.'s out-of-court statement to his mother met the requirements of the excited-utterance exception to the hearsay rule. The supreme court reversed the appellate court and stated the following:

> "Defendant argues that the time period between the alleged incident and the child's statement to his mother demonstrates that the declaration was not spontaneous. Defendant points out that the child said nothing to his mother when she picked him up at [the day-care center], during the drive home and for a time after they arrived. Defendant also notes that the child made the statement in response to his mother's questioning and that the statement occurred as long as five hours after the alleged incident. Finally,

defendant argues that J.B.'s out-of-court statement to his mother is so ambiguous that it cannot be said that the declaration related to the circumstances of the occurrence.

This court has recognized a number of exceptions to the rule prohibiting the admission of hearsay evidence, finding that the statements which fall within the exceptions, and are therefore admissible, demonstrate sufficient guarantees of reliability or trustworthiness despite the inability of an opponent to cross-examine the declarant before the trier of fact. (See, e.g., People v. Clark (1972), 52 Ill. 2d 374, 389.) As defendant notes, one of the factors to consider in determining the admissibility of a hearsay statement under the spontaneous declaration exception is the absence of time to fabricate. See People v. Poland (1961), 22 Ill. 2d 175, 181.

As defendant points out, the time that elapsed between the incident and the declaration here would generally render the statement inadmissible hearsay. However, given the circumstances present in this case, we find that the trial judge's ruling that

three-year-old J.B.'s statement was reliable and within the excited utterance exception to the hearsay rule was not an abuse of discretion. See People v. Shum (1987), 117 Ill. 2d 317, 343 ('time factor is an elusive element and will vary with the facts of the case'); M. Graham, Cleary & Graham's Handbook of Illinois Evidence §803.3, at 552 (4th ed. 1984) ('Lapse of time is but one factor to be considered by the court in reaching an answer [of whether the statement is an excited utterance] in the particular case. Other factors include the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest').

We believe that the evidence at trial sufficiently demonstrates that the child's statement was the product of the event, rather than the child's deliberation. J.B.'s behavior demonstrated the effect the incident had on the child. Although he usually greeted his mother with outward affection, he was on this occasion quiet and withdrawn. He remained uncharacteristically silent during the two-block drive from [the day-care center] and upon his arrival at home. His

unusual behavior continued through the afternoon snack. The first time J.B. had an opportunity to relate the incident to anyone away from the environment in which the incident occurred was when his mother picked him up from the center. Although he said nothing about the incident during the drive to his home, his first statement to his mother related to the incident. At that time, according to his mother, the child was still visibly upset and withdrawn. Under the circumstances here, it is not unreasonable to believe that the mother's question to her three-year-old son, asking him 'what's wrong,' elicited an unreflected and spontaneous declaration concerning an incident that occurred earlier in the day. (Cf. People v. Gacho (1988), 122 Ill. 2d 221, 241 (declaration 6½ hours after occurrence was spontaneous when victim confined in trunk in seriously wounded condition and utterance was given in response to question on first opportunity for victim to speak).) We find no evidence that would explain a motive for the child to fabricate the statement, and the terminology contained in the child's declaration substantiates its reliability. (See

State v. Ryan (1984), 103 Wash. 2d 165, 691 P.2d 197 (whether language of statement was likely to have been used by a child the age of declarant important in determination of statement's reliability).) That the statement came in response to a question put to him by his mother does not affect its credibility. The question was not suggestive and only prompted J.B. to speak." Nevitt (Mar. 29, 1990, Docket No. 67756, slip op. at 9-11), Ill. 2d at , N.E.2d at .

In the present case, defendant concedes that the statements S.G. made to DeVore, S.G.'s baby-sitter, meet the criteria for admission as spontaneous declarations. Defendant argues, however, that S.G.'s statements to Grigsby (S.G.'s mother) and to Officer Lewis, nurse Reents, and Dr. Meinzen do not meet those criteria. We will address this argument only with regard to S.G.'s statements to Grigsby and Lewis. Because we find that S.G.'s statements to Reents and Meinzen were properly admitted under section 115-13 of the Code (as discussed in the next section of this opinion), we need not consider whether those statements might also be admissible as spontaneous declarations.

S.G.'s statements to DeVore about the incident occurred literally within moments of DeVore's seeing defendant flee the scene of the crime he allegedly had just committed. About 30 minutes after S.G.'s statements to DeVore, S.G.'s mother, Grigsby, returned home, and S.G. told Grigsby what had happened.

Grigsby then called the police, and Officer Lewis arrived "just a few minutes" after she called. In the kitchen of her home, S.G. spoke to Lewis with no one else present. On this record, it appears that these three separate statements of S.G. were all made within 45 minutes of her being sexually assaulted in her bed.

Defendant argues that S.G.'s statement to Grigsby was not a spontaneous declaration because S.G. had "calmed down" and was no longer reacting to a startling occurrence. Defendant cites other factors as being inconsistent with S.G.'s statements being spontaneous declarations, such as Grigsby's urging her daughter "to tell me what happened" and that S.G. was initially reluctant to do so. With regard to S.G.'s statements to Lewis, defendant makes these same arguments.

In People v. Harris (1985), 134 Ill. App. 3d 705, 480 N.E.2d 1189, the court discussed the factors which should be considered in deciding whether a statement qualifies as a spontaneous declaration and stated the following:

> "Whether a statement was sufficiently spontaneous to qualify for admission and evidence under this exception to the hearsay rule is a preliminary question for determination by the trial court. [Citation.] The court's ruling will be held an abuse of discretion only if the statements are not so intimately connected with the event as to indicate a lack of premeditation.

[Citation.] In deciding whether the declarant acted without thought, the court is required to consider all the circumstances surrounding the making of the statement. [Citation.] The time which elapsed between the occurrence and the declaration and the distance which the declarant travelled from the scene before making the declaration are both material in determining spontaneity. However, neither factor is controlling. [Citation.] Also, the fact that the statement was made in response to a question will not itself deprive an utterance of the requisite spontaneity to establish its admissibility. Thus, statements made in response to general inquiries as to what has occurred may nevertheless be spontaneous." Harris, 134 Ill. App. 3d at 711, 480 N.E.2d at 1194-95.

We also agree with the following remarks from People v. Bitler (1986), 146 Ill. App. 3d 477, 497 N.E.2d 137, which dealt with out-of-court statements by declarants of tender years who did not testify at trial:

"The trial court must look to the surrounding circumstances to determine whether there was an opportunity for reflection and invention. [Citation.]

Illinois courts have recognized that special circumstances exist concerning the motivations behind the statements of very young children. The reason that their statements are admitted is that it is unlikely that a child of tender years will have any reason to fabricate stories of sexual abuse. (In re Marriage of Theis (1984), 121 Ill. App. 3d 1092, 460 N.E.2d 912; People v. Chatman (1982), 110 Ill. App. 3d 19, 441 N.E.2d 1292.) In Wisconsin, the courts have noted that the stress of a sexual assault upon a child will remain with the child long after it occurred, and that the child's statements will be unfabricated for three reasons: (1) the child is apt to repress the incident; (2) it is often unlikely the child will discuss such a stressful incident with anyone but the mother; and (3) the characteristics of young children work to produce declarations free of conscious fabrication for a longer period after the incident than adults. State v. Padilla (Wis. App. 1982), 110 Wis. 2d 414, 329 N.W.2d 263.

We agree here, as we did in Theis, with the Padilla court's analysis; and we find that the victims had neither the time nor the

opportunity to fabricate the statements, even assuming, arguendo, that the defendant molested the victims 24 hours prior to the relevant statements." Bitler, 146 Ill. App. 3d at 481-82, 497 N.E.2d at 139.

Based on the foregoing authority, we find defendant's arguments to be unpersuasive. The trial court has considerable discretion in determining whether a statement is admissible as a spontaneous declaration, and its decision will not be reversed absent an abuse of that discretion. (Bitler, 146 Ill. App. 3d at 481, 497 N.E.2d at 139.) On the facts in this case, the trial court did not abuse its discretion in deciding that S.G.'s statements to DeVore, Grigsby, and Lewis were all spontaneous declarations and admissible.

II. STATEMENTS UNDER SECTION 115-13 AS AN EXCEPTION TO THE HEARSAY RULE

As noted earlier, the trial court permitted nurse Reents and Dr. Meinzen to testify as to statements S.G. made to them. When defense counsel objected to their testimony on the grounds that it would be hearsay, the State responded that the testimony was proper on the grounds that the statements of S.G. were (1) spontaneous declarations, and (2) made to medical personnel for purposes of medical diagnosis or treatment, and thus admissible under section 115-13 of the Code (Ill. Rev. Stat. 1987, ch. 38, par. 115-13). Section 115-13 of the Code reads as follows:

"In a prosecution for violation of Section 12-13, 12-14, 12-15 or 12-16 of the

'Criminal Code of 1961', statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

That section was added to the Code on January 1, 1988, and the only reported decision of which we are aware in which the Illinois Supreme Court or the Illinois Appellate Court construes it is the decision of this court in People v. Rushing (1989), 192 Ill. App. 3d 444, 548 N.E.2d 788.

In Rushing, the defendant argued that the testimony of the physican who examined and spoke with the nine-year-old complainant in that aggravated criminal sexual abuse case improperly included details of the alleged offense that were not relevant to the complainant's diagnosis and treatment. The physician's examination occurred approximately one month after the alleged incident of sexual abuse. The physican testified the complainant told the physican that the defendant (whose name the physician mentioned) told complainant not to tell anyone; that if she did tell, he would go to jail, and when he got out, he would kill her mother and father. (Rushing, 192 Ill. App. 3d at 447, 548 N.E.2d at 790.) This court rejected defendant's argument and stated the following:

"In examining and treating such complaints of a nine-year-old girl suspected of sexual abuse, details of the sexual acts were certainly pertinent. Under the same circumstances, the threat was relevant to D.B.'s [the victim's] state of mind and emotional condition. All the statements were relevant in determining the approximate time of the alleged act and to the credibility of D.B. These are all matters which would reasonably be considered and relied upon by medical personnel in making any diagnosis or conclusion as to a patient's condition and proper course of treatment. Thus, the statements were also admissible under section 115-13." Rushing, 192 Ill. App. 3d at 453, 548 N.E.2d at 793-94.

As this court indicated in Rushing, we hold that section 115-13 of the Code evinces a legislative intent that the phrase "descriptions *** insofar as reasonably pertinent to diagnosis or treatment" should be liberally construed. The legislature directed that statements containing such descriptions shall be admissible. A crabbed interpretation of that phrase, requiring trial courts to parse statements made by a victim when a medical history is taken, would be inconsistent with legislative intent.

The testimony of nurse Reents and Dr. Meinzen describing the questions they asked of S.G. and the reasons why those questions were asked makes clear that the statutory prerequisites for this new hearsay exception were met. Meinzen especially emphasized the importance of taking a history from the patient in order to properly make a diagnosis and decide upon further treatment, if any.

Defendant also argues that S.G.'s statements to Meinzen and Reents concerning the details of the incident do not fall within the treating-physician exception to the hearsay rule. Citing People v. Walton (1976), 43 Ill. App. 3d 74, 356 N.E.2d 1131, defendant claims that while a treating physician may testify about a patient's statements concerning presently existing bodily conditions, the doctor may not relate the patient's statements which concern details of the alleged offense. We disagree. We conclude that section 115-13 was designed, in part, to sever the artificial restraints heretofore imposed by case law on the ability of a physician to testify about what his or her patient told the physician for purposes of medical diagnosis or treatment.

To the extent that Walton, an opinion of the Second District Appellate Court, is inconsistent with this holding, we decline to follow it. Section 115-13 of the Code was enacted 12 years after Walton, and its enactment implicitly overrules that case.

III. DEFENDANT'S CLAIM THAT THE DECLARANT MUST BE "UNAVAILABLE" OR PRODUCED BEFORE THE DECLARANT'S OUT-OF-COURT STATEMENT MAY BE ADMITTED AS AN EXCEPTION TO THE HEARSAY RULE

Defendant argues that even if the witnesses to whom S.G. spoke could properly testify to what S.G. told them under traditional or statutory exceptions to the hearsay rule, that testimony nonetheless violated his right under the sixth amendment to the United States Constitution to be confronted with the witnesses against him. Citing Ohio v. Roberts (1980), 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, defendant argues as follows:

> "[E]ven where the evidence falls within a firmly rooted hearsay exception, the prosecution still must either produce the declarant for cross-examination or demonstrate that he is unavailable. *** Since the prosecution neither produced the declarant [S.G.] for cross-examination nor established that she was unavailable, Randall White was denied his Sixth Amendment right to confront the witnesses against him."

In making this argument, defendant's counsel on appeal inexplicably fails to cite or discuss United States v. Inadi (1986), 475 U.S. 387, 89 L. Ed. 2d 390, 106 S. Ct. 1121, in which the United States Supreme Court repudiated the interpretation of Roberts upon which defendant relies. Nor does counsel cite or discuss People v. Ingram (1987), 162 Ill. App. 3d 257, 515 N.E.2d

1252, a decision of this court which analyzed both Roberts and Inadi. The Court in Inadi said the following:

> "We granted certiorari, [citation], to resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E) [the coconspirator exception to the hearsay rule]. We now reverse.
>
> The Court of Appeals derived its rule that the Government must demonstrate unavailability from our decision in Roberts. It quoted Roberts as holding that 'in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case *** the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.' 448 U.S., at 65[, 65 L. Ed. 2d at 607, 100 S. Ct. at 2538]. The Court of Appeals viewed this language as setting forth a 'clear constitutional rule' applicable before any hearsay

can be admitted. 748 F.2d, at 818. Under this interpretation of Roberts, no out-of-court statement would be admissible without a showing of unavailability.

Roberts, however, does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause. Roberts itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay. *** Roberts should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: 'the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.' [Citation.]

The Confrontation Clause analysis in Roberts focuses on those factors that come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. See Fed. Rule Evid. 804(b)(1). In particular, the

Roberts Court examined the requirement, found in a long line of Confrontation Clause cases involving prior testimony, that before such statements can be admitted the government must demonstrate that the declarant is unavailable. [Citations.] All of the cases cited in Roberts for this 'unavailability rule' concern prior testimony. ***

Roberts must be read consistently with the question it answered, the authority it cited, and its own facts. *** Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." (Emphasis added.) Inadi, 475 U.S. at 391-94, 89 L. Ed. 2d at 396-98, 106 S. Ct. at 1124-25.

The above-quoted language from Inadi makes clear that the decision in Roberts must be restricted to the factual context in which Roberts arose, i.e., "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial." (Roberts, 448 U.S. at 58, 65 L. Ed. 2d at 602, 100 S. Ct. at 2535.) The discussion in Roberts of hearsay exceptions unrelated to the particular exception which the State in that case was arguing was wholly unnecessary to the decision

reached. Indeed, that discussion may be the "Sistine Chapel" of obiter dicta.

Because of the uncertainty that Roberts caused regarding the application of exceptions to the hearsay rule, it is necessary that we be clear and emphatic in our holding on this point: Whether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule. The only exception to this holding is the factual situation present in Roberts, i.e., the use at trial of the previous testimony of a witness who is no longer available.

We provide the foregoing emphasis because, despite the clear language of Inadi, we conclude the decisions of other courts have not given full effect to Inadi's repudiation of the dicta in Roberts. For instance, in Nelson v. Farrey (1989), 874 F.2d 1227, the United States Court of Appeals for the Seventh Circuit had occasion to consider the effect of Inadi upon Roberts and stated the following:

> "Six years [after Roberts was decided] the Supreme Court disavowed any suggestion that Roberts had stated a general rule, confined the case to the particular situation presented by it--a prosecutor's attempt to use the transcript of testimony from a previous judicial proceeding in lieu of live testimony at trial--and allowed the admission of

> out-of-court statements by a co-conspirator who was available to testify. [Citation.]
>
> At present, then, there is no single authoritative criterion for when the admission of hearsay evidence violates a defendant's constitutional right to confrontation." Nelson, 874 F.2d at 1227.

Nelson concerned a prosecution for a sex offense. Judge Flaum wrote a concurring opinion in Nelson in which he specifically disagreed with the majority assertion that the unavailability of the complainant was not a constitutional "sine qua non of allowing her out of court statements to be used in evidence against her father." (Nelson, 874 F.2d at 1230 (Flaum, J., concurring).) Judge Flaum opined that the confrontation clause required the prosecution to show that the complainant was not available to testify at trial. He concurred because he believed the prosecution had done so. He also made the following observations:

> "The general language contained in Roberts prompted many courts to conclude that a demonstration of the declarant's unavailability was a constitutional pre-condition to the admission of most hearsay statements. [Citation.] The validity of this interpretation of Roberts, however, is suspect in view of [Inadi]. *** In the course of the opinion [in Inadi], the Court employed

language that could be interpreted as repudiating the unavailability discussion in Roberts.

*** Given its broadest construction, Inadi stands for the proposition that the unavailability of the declarant is a relevant constitutional factor only when the hearsay statements involve testimony given at a preliminary hearing. In my view, however, Inadi does not represent a repudiation of Roberts' unavailability discussion. Rather, I believe that Inadi merely reaffirms and applies the Roberts principle that a showing of unavailability is not required in all situations." Nelson, 874 F.2d at 1231 (Flaum, J., concurring).

We cite the foregoing language from Judge Flaum's concurring opinion because, with all due respect, we emphatically disagree. Our disagreement in part is due to the presence of a dissenting opinion in Inadi by Justice Marshall in which he vigorously condemns the majority opinion for limiting Roberts as we have now found it to be so limited. (Inadi, 475 U.S. at 400-11, 89 L. Ed. 2d at 402-09, 106 S. Ct. at 1129-34 (Marshall, J., dissenting).) We also find significant that Justice Blackmun, the author of Roberts, joined the majority opinion in Inadi, not the dissent of Justice Marshall.

Further, we have difficulty understanding the reasoning behind Judge Flaum's conclusion that Inadi did not repudiate the broad-based "unavailability" discussion of Roberts. In our judgment, the Supreme Court, in the language we quoted from Inadi, repeatedly repudiates this Roberts dicta. Our question for those who think otherwise is this: If, in fact, the court intended to repudiate the Roberts dicta, what language could it have used to get the job done that was any stronger than the language actually employed?

We also disagree with People v. Rocha (1989), 191 Ill. App. 3d 529, 547 N.E.2d 1335, to the extent that decision holds the "unavailability" doctrine of Roberts to be still valid. In Rocha, the Second District Appellate Court had occasion to construe section 115-10 of the Code in its most recent version, as amended by Public Act 85-837, effective January 1, 1988 (1987 Ill. Laws 3471). (Ill. Rev. Stat. 1987, ch. 38, par. 115-10.) That statute provides that out-of-court statements of the alleged victim under the age of 13 in a prosecution for a sexual act may be admitted under certain circumstances. One of those circumstances is if the child either (1) testifies at the proceeding, or (2) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement. Ill. Rev. Stat. 1987, ch. 38, pars. 115-10(b)(2)(A), (b)(2)(B).

In Rocha, the Second District discussed not only this statutory requirement of unavailability, but also the issue of the witness' unavailability in view of the confrontation clause of the sixth amendment to the United States Constitution. In

doing so, it spoke approvingly of the "unavailability" doctrine of Roberts, and it evaluated section 115-10 of the Code to determine whether that section met the criteria discussed in Roberts. The court concluded that the statute did so. Rocha, 191 Ill. App. 3d at 541, 547 N.E.2d at 1343.

The Second District in Rocha cited Inadi as being a "recent Supreme Court decision which questions whether the Ohio v. Roberts analysis is even applicable outside of the factual setting of that case." (Rocha, 191 Ill. App. 3d at 541, 547 N.E.2d at 1343.) The Rocha decision is unclear regarding the continuing validity of the Roberts dicta, but, as before, we emphasize that we disagree with the holding in Rocha to the extent that it concludes Roberts has any application beyond the limited factual circumstances that case addressed.

In reaching its holding in Rocha with regard to Roberts, the Second District relied heavily on People v. Bastien (1989), 129 Ill. 2d 64, 541 N.E.2d 670, a case in which the Illinois Supreme Court held unconstitutional a statute authorizing the admissibility of the taped statement of the child-victim in a case involving charges of sexual abuse when the alleged victim was available at trial for cross-examination. We conclude this reliance was in error. In Bastien, the supreme court was dealing with a situation in which the prosecution, as in Roberts, was attempting to use a witness' prior testimony given by videotape in lieu of that witness being called upon to give her direct examination at trial. As we stated earlier, in these circumstances, Roberts still has validity, but only in these

circumstances. In our judgment, the Second District in Rocha gave importance to Roberts beyond its factual context. Bastien lends no support to such an interpretation.

We also note that our position regarding Roberts and Inadi is consistent with the views expressed by the Third District Appellate Court in People v. Unes (1986), 143 Ill. App. 3d 716, 722-23, 493 N.E.2d 681, 685-86.

We agree with the views expressed on this subject in a recent decision of the Supreme Court of Washington in State v. Palomo (1989), 113 Wash. 2d 789, 783 P.2d 575. In Palomo, a police officer observed two persons struggling in a doorway. When he approached the scene, he observed a man kneeling on top of a woman. The woman was lying on her back. The man's pants were unbuttoned, unzipped, and fully opened in front. The woman's pants were undone and down around her knees. The man appeared to be pulling at the woman's pantyhose. He had one hand on the woman's waist and the other hand on her pantyhose. The woman was hitting and scratching the man and was screaming for help. The officer separated them and observed what appeared to be fresh scratches on the man's face. He arrested the man, who was the defendant, Palomo. As the officer did so, he testified that the woman was "`crying, weeping, very upset.'" (Palomo, 113 Wash. 2d at , 783 P.2d at 576.) He further testified, "`[s]he said he was trying to rape me, get him away from me.'" Palamo, 113 Wash. 2d at , 783 P.2d at 576.

The defendant was charged with the attempt (rape) of E.S., but for some unexplained reason, E.S. did not testify. The

prosecutor presented a case consisting entirely of the testimony of the arresting officer. Defense counsel objected to the admission of the statement as hearsay, but the objection was overruled. The defendant did not testify.

After all of the evidence was presented, the defense argued for dismissal on the ground that the admission of the alleged victim's hearsay statement violated the defendant's right to confrontation under the United States Constitution and the Washington State Constitution because her unavailability had not been established. That argument was rejected, and defendant was convicted of attempt (rape) as charged.

On appeal of this conviction, the Washington Court of Appeals, in an unpublished opinion, held that the admission of the out-of-court hearsay statement without the showing of a good-faith effort to produce the witness violated defendant's right to confrontation.

On review of that decision, the Supreme Court of Washington noted that the trial court admitted the police officer's testimony, reciting the alleged victim's statement, under the "excited utterance" exception to the hearsay rule. The supreme court found the statement properly admitted under that recognized exception and noted that the court of appeals and defendant both relied on Roberts for the broad proposition that the confrontation clause bars admissibility of hearsay statements unless the unavailability of the out-of-court declarant is shown. The Washington Supreme Court then stated the following:

"Roberts considered an Ohio statute that required a showing of unavailability for admission of prior testimony. In the present case, the statement of [E.S.] was admitted under the excited utterance exception to the hearsay rule which does not require unavailability of the declarant. [Citations.]

Furthermore, United States v. Inadi [citation], limited the Roberts requirement of unavailability to cases involving prior testimony. [Citations.] Ohio v. Roberts, supra, is not authority for requiring a showing of unavailability for admission of an excited utterance. [Emphasis added.]

***

The 'excited utterance' exception to the hearsay rule applies even though the declarant is available as a witness. A showing of unavailability is not required. [Emphasis added.] [Citations.] The theory of this exception which vouches for its reliability is that the stress of the event suppresses the reflective faculties of the declarant with the result that the utterances are sincere and spontaneous. ***

***Although statements of co-conspirators are an exemption to the hearsay rule and

excited utterances are an exception to the hearsay rule, Inadi noted that the same confrontation clause principles apply to both exemptions and exceptions." (Emphasis in original unless otherwise noted.) Palomo, 113 Wash. 2d at , 783 P.2d at 578-79.

The court concluded by noting that defendant was not denied his sixth amendment right to confrontation. "Under the excited utterance exception to the hearsay rule, [E.S.'s] out-of-court statement is admissible without a showing of her unavailability." Palomo, 113 Wash. 2d at , 783 P.2d at 579-80.

In People v. Ingram (1987), 162 Ill. App. 3d 257, 515 N.E.2d 1252, this court was presented with the same argument that is being made in the present case, i.e., that before a spontaneous declaration can be received into evidence, the confrontation clause normally requires a showing that the out-of-court declarant is unavailable. Roberts and Inadi were considered, and this court then rejected this argument, holding as follows:

> "In United States v. Inadi [citation], the court held the Roberts requirement of a showing of unavailability was inapplicable to the coconspiracy exception to the hearsay rule. The court noted that Roberts, which addressed the admissibility of prior testimony, should be limited to its facts. It does not stand for the proposition that no

out-of-court statement is admissible absent a showing of unavailability.

In Illinois prior to admission of an out-of-court statement under the spontaneous declaration exception to the hearsay rule, the statement must meet three criteria: (1) it must have resulted from an occurrence which is sufficiently startling that it was likely to produce a spontaneous and unreflecting statement; (2) it must have been made before there was time to fabricate the statement; and (3) it must have been related to the occurrence. People v. Lewis [citation]; People v. McNeal [citation]; People v. Fields [citation].

Defendant argues that Roberts modified State law concepts by adding requirements of unavailability and reliability and spontaneous declarations from unknown declarants can never be admitted. He urges this court to overrule McNeal to the extent that it is inconsistent with Roberts. In McNeal, defendant was convicted of aggravated battery arising out of a fight which occurred in a tavern. A witness testified that he heard an unknown declarant advise the defendant not to do it immediately prior to defendant's

shooting the victim. The court held the testimony was admissible regardless of the declarant's presence at trial because it met the criteria set forth for an excited utterance. [Citations.] ***

Roberts as interpreted by Inadi does not require a modification of McNeal." Ingram, 162 Ill. App. 3d at 260-61, 515 N.E.2d at 1254.

We reaffirm our holding in Ingram.

IV. SENTENCING ISSUES

Defendant was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint, and he was sentenced respectively to 10 years, 6 years, and 2 years in prison. Each of these sentences was ordered to run concurrently with the others. Aggravated criminal sexual assault is a Class X felony (Ill. Rev. Stat. 1987, ch. 38, par. 12-14(c)), meaning it is a non-probationable offense that carries a possible prison sentence of not less than 6 years nor more than 30 years (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1(a)(3)). Residential burglary is a Class 1 felony (Ill. Rev. Stat. 1987, ch. 38, par. 19-3(b)), meaning it carries a possible prison sentence of not less than 4 years and not more than 15 years (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1(a)(4)). Unlawful restraint is a Class 4 felony (Ill. Rev. Stat. 1987, ch. 38, par. 10-3(b)), meaning it carries a possible prison sentence of not less than

one year nor more than three years (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1(a)(7)).

At the sentencing hearing, the court permitted a sheriff's investigator, over defense counsel's objection, to testify to a conversation the investigator had with a seven-year-old female. The child said defendant entered her bedroom while she was asleep, took off his pants and underwear, removed the child's pajama bottoms and undies, and then hurt the child by lying on top of her. She told the investigator that she called for her mother who eventually entered the room and told the defendant to leave the residence. Citing People v. La Pointe (1981), 88 Ill. 2d 482, 431 N.E.2d 344, defendant argues that the admission of this hearsay evidence, in the absence of any corroboration, was error because the evidence was not reliable and improperly prejudiced him in the eyes of the sentencing court.

Upon review of defendant's record and the circumstances of the offenses he committed, we conclude we need not concern ourselves with whether the testimony of the sheriff's investigator was properly received in evidence at the sentencing hearing. See People v. Mitchell (1981), 98 Ill. App. 3d 398, 424 N.E.2d 658 (remand for resentencing not necessary where the record does not affirmatively demonstrate that the matter complained of was a factor in the sentence imposed).

At the time of the sentencing hearing in November 1988, defendant was 36 years old. In the six years prior to that date, he had been convicted of four separate felony offenses (burglary, two counts of aggravated battery, and felony criminal damage to

property), as well as two Class A misdemeanors (theft and criminal damage to property). Defendant had been sentenced to multiple periods of probation and had received a three-year sentence to the Department of Corrections in December 1984. Despite this miserable record of criminality, defendant received only a 10-year sentence on the most serious of the offenses of which he was convicted, aggravated criminal sexual assault. We note that the sentence imposed is only four years above the statutory minimum, and it is 20 years below the statutory maximum.

As to the defendant's specific criminal behavior in this case, the record shows that at 4 a.m., defendant surreptitiously entered the home of a former girlfriend (who he had reason to believe would not be home) and sexually assaulted a four-year-old child as she slept in her bed. A remand for resentencing on these facts with this defendant's criminal history is unnecessary because we can hardly imagine how a sentence of less than 10 years could be imposed. Accordingly, viewing any claimed error in the admission of evidence at the sentencing hearing in a light most favorable to the defendant, we hold any such error could not have been prejudicial.

For the reasons stated, the judgment and sentences imposed are affirmed.

Affirmed.

KNECHT, P.J., concurs.

McCULLOUGH, J., specially concurs.

ORIGINAL

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RANDALL D. WHITE, Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

NOTICE AND PROOF OF SERVICE

TO: Honorable Joseph F. Spaniol, Jr.
Clerk of the Supreme Court of
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Please take notice that I have mailed the original and ten copies of the Petition for Writ of Certiorari to the Clerk of the above Court and that I am serving the Attorney General with three copies of the Petition, the SAAP with two copies and the State's Attorney and the petitioner with one copy each of the Petition by

depositing the copies in the mail in Springfield, Illinois in envelopes with sufficient prepaid postage and addressed as indicated above on this 29th day of October, 1990. I further certify that all parties required to be served have been served.

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ORIGINAL

RESPONSE REQUESTED

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NO. 90-6113

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

RANDALL D. WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court of Illinois,
Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 90-6113

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Randall White was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint. He was sentenced to concurrent terms of ten years imprisonment for aggravated criminal sexual assault, six years imprisonment for residential burglary, and two years imprisonment for unlawful restraint.

Mr. White's convictions were affirmed on direct appeal in an opinion reported at 198 Ill.App.3d 641, 555 N.E.2d 1241 (4th Dist. 1990). The opinion sets forth the facts applicable to the trial by jury, which are not in dispute.

On direct appeal, Mr. White contended that admission of certain hearsay statements violated his Sixth Amendment right under the Confrontation Clause. Specifically he argued that, under Ohio v. Roberts, 448 U.S. 56 (1980), the prosecution must always either produce the declarant for cross-examination or demonstrate her unavailability even where the evidence would otherwise be admissible under a firmly rooted hearsay exception. The appellate court rejected this argument based on United States v. Inadi, 475 U.S. 387 (1986). People v. White, 198 Ill.App.3d 641, 656-57, 555 N.E.2d 1241, 1251 (1990).

The Illinois Supreme Court denied leave to appeal this issue.

REASONS FOR DENYING THE WRIT

THE ISSUE LEFT OPEN IN IDAHO v. WRIGHT IS NOT PRESENTED IN THE INSTANT CASE.

In Ohio v. Roberts, 448 U.S. 56 (1980) this Court considered whether admission of evidence under a prior testimony exception to the hearsay rule had violated the defendant's rights under the Confrontation Clause. The Court stated the Confrontation Clause restrictions on hearsay evidence normally requires a showing that the declarant is unavailable. Id. at 66. Then the out of court statement is admissible only if it bears sufficient indicia of reliability - either falling within a firmly rooted hearsay exception or showing particularized guarantees of trustworthiness. Id.

In United States v. Inadi, 475 U.S. 387 (1986), this Court determined that the Confrontation Clause did not require a showing of unavailability for statements otherwise admissible under Federal Rules of Evidence 801(d)(2)(E). The Third District Court of Appeals had viewed language in Roberts as setting forth a clear constitutional rule requiring a showing of unavailability before any hearsay can be admitted. Id. at 392. This court held that Roberts did not stand for such a radical proposition or wholesale revision of the law of evidence. Id., at 392-94.

In Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139 (1990), this Court considered whether the Confrontation Clause was violated by admission of evidence under Idaho's residual hearsay exception. 803(24). This rule, like the equivalent federal rule, was not a firmly rooted exception to the hearsay rule. Id., at ___, 110 S.Ct. at 3147. This Court left open the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires a showing of unavailability. Id.

The instant case also involves out of court statements by a child, but these statements were admitted under two firmly rooted exceptions to the hearsay rule - excited utterance/ spontaneous declarations and medical diagnosis/treatment. People v. Randall White, 198 Ill.App.3d 641, 648-56, 555 N.E.2d 1241, 1246-1251. Unlike the "residual exceptions", these are both firmly rooted exceptions. Idaho v. Wright, ___ U.S. ___, 110 S.Ct. at 3149. Both of these exceptions traditionally require no showing of unavailability. Federal Rules of Evidence 803(1) and

(4); 56 F.R.P. 183, 303-306. Other States evidence rules are similar. See e.g. State v. Boston, 46 Ohio St. 3d 108, ___, 545 N.E.1d 1220, 1230, n. 5, 1232-22 (Ohio 1989); State v. Palomo, 113 Wash. 2d 789, ___, 783 P.2d 575, 578-79 (1989).

Illinois, like many States, has adopted a statutory hearsay exception specifically for child victims of sexual abuse. Ill. Rev. Stat., ch. 38, par. 115-10. Compare State v. Galagher, 554 A.2d 221 (Va. 1988); Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (Ark. 1987). That exception is not at issue in this case. People v. White, 198 Ill.App.3d 641, 660, 555 N.E.2d 1241, 1253 (Ill.App. 4th Dist. 1990). Illinois does not have an exception equivalent to Idaho or Federal Rule 803(24). Therefore, the instant case does not present the question left open in Wright.

In the state appellate court, the petitioner urged that Roberts imposed a constitutional requirement of unavailability on all hearsay exceptions. People v. White, 198 Ill.App.3d 641, 656, 555 N.E.2d 1241, 1251 (1990). This Court has already answered that question in the negative in Inadi. See Graham Handbook Of Federal Evidence, sec. 802.2, p. 822 (West. 1991); Manocchio v. Moran, 919 F.2d 770, 774 (1st Cir. 1990); Jonakait, Restoring The Confrontation Clause To The Sixth Amendment, 35 U.C.L.A.L.Rev. 557, 561 (1988). Therefore, there is no compelling reason for this Court to review the instant case.

CONCLUSION

WHEREFORE, for all the foregoing reasons, respondent respectfully requests that this Court deny the petition for certiorari in the instant cause.

Respectfully submitted,

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NO. 90-6113
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

RANDALL D. WHITE,
Respondent.

NOTICE OF FILING AND PROOF OF SERVICE

TO; Gary R. Peterson, Assistant Defender
Office of the State Appellate Defender
400 S. 9th Street, Suite 102
P. O. Box 5750
Springfield, IL 62705-5750

PLEASE TAKE NOTICE that on February 13, 1991, I have filed with the Clerk of the Supreme Court of the United States twelve (12) copies of Respondent's Brief in Opposition in the above entitled cause.

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Attorney General
State of Illinois

By: Douglas K. Smith
DOUGLAS K. SMITH
Assistant Attorney Genera
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The undersigned being duly sworn on oath, deposes and states that a copy of the attached Notice and one (1) copy of Respondent's Brief in Opposition was served on the above named on February 13, 1991 by depositing same in the United States mail at 500 South Second Street, Springfield, Illinois.

Douglas K. Smith

SUBSCRIBED and SWORN to before
me this 13th day of February, 1991.

Helen L. Radigan
Notary Public

OFFICIAL SEAL
HELEN L. RADIGAN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12-3-92

Supreme Court, U.S.
FILED
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No. 90-6113

In The

Supreme Court of the United States

October Term, 1990

RANDALL D. WHITE,

Petitioner,

vs.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed October 31, 1990
Certiorari Granted April 29, 1991

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RELEVANT DOCKET ENTRIES

Date	Proceeding
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7/27/88	Judgment entered on verdicts.
11/28/88	Judgment entered on sentence.

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
VERMILION COUNTY, DANVILLE, ILLINOIS

Illinois
v.
Randall D. White

* * *

[13] MR. MCFETRIDGE: Objection to what Shannon may have said, Your Honor, hearsay.

MR. MILLS: Tender specifically as spontaneous declaration immediately after the defendant leaving the room. The child is obviously already visibly upset based upon the testimony before the Court at this time clearly within appropriate time frame sufficiently startling event to result in a free unreflecting statement.

THE COURT: You want to be heard on this, Mr. McFetridge, or do you want to be heard on this question?

MR. MCFETRIDGE: Yes, Your Honor I would. Perhaps side bar.

THE COURT: All right have a side bar.

WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD AT THE SIDE BENCH:

MR. MCFETRIDGE: Your Honor, at this time I would respectfully object and disagree with Mr. Mills' contention this is a spontaneous declaration within the recognized exception of the hearsay rule. Obviously an out of court statement tendered for the truth of the matter

contained therein is hearsay. Mr. Mills apparently says that it is something startling [14] that was spontaneous.

First of all there's been no foundation that that was the case. There's been no indication that this is probative that this happened immediately after that is there any lack of opportunity to fabricate the rest. I would suggest at this point Mr. Mills has simply failed to come within the appropriate exception.

MR. MILLS: Your Honor, would merely note based upon the evidence before the Court I think there's already a foundation. Also the tender would be that she basically said that she'd been – that the defendant put his hand over her mouth and had touched her while she was asleep at the time.

In addition in this particular case we have testimony that the child was placed in bed some hours before this; woke up screaming or at least was screaming upset and crying and I forgot what the words were, mumbled something like that, when the witness went in the room. What more is there to it. So that it is spontaneous and unreflective.

And particularly would ask the points that I've provided to the Court and counsel yesterday I think it's clearly shown that to be admissible as spontaneous declaration of the truth of the matter of [15] the statement.

THE COURT: Well, I think the testimony which is to be elicited here is permissible as an exception as a spontaneous declaration and so the – and that this – it fits the requirements that the law sets forth with regard to this exception as indicated by Mr. Mills. And I think that

the circumstances here as testified to by this witness with regard to the screaming of the child and then what was said immediately thereafter would comply with all the factors necessary. So the objection will be overruled.

WHEREUPON, SUBSEQUENT TO SAID SIDE BENCH THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:

THE COURT: All right. The objection is overruled. And you may ask the question.

* * *

[45] MR. MCFETRIDGE: Judge, I will object to that if that is not entirely clear if the complaint is allegedly made by Shannon I think it's hearsay. If it was made by somebody else –

MR. MILLS: Your Honor –

THE COURT: Did you hear the objection?

MR. MILLS: Yeah. Your Honor, I don't intend to go further at this point than that. Two it's clearly based upon admissible as statements made to medical personnel pursuant to the statute 1:15 I've forgotten the number right now 13 statements made by the victim to medical personnel as to basically what is for purposes of diagnosis in this case evidence reasonably relied upon by the doctor in his examination in making a diagnosis.

I would note that I'm not further going into what other persons may have told him at this point just to lay the foundation as to what happened and getting [46] into doing the examination on Shannon.

THE COURT: Overruled.

* * *

Excerpt of Hearing on Prosecution's Motion to Exclude Spectators.

[Vol. VI; R. 98]

* * *

[98] THE COURT: Are you ready to call your next witness?

MR. MILLS: Yes, Your Honor. However, at this time the State would be moving to exclude spectators from the courtroom pursuant to the Illinois Revised Statutes. Next witness is Shannon Grigsby a child of five years of age and statute allows exclusion of all those other persons other than necessary to court.

THE COURT: All right. Is there anyone that you have asked or permitted to be present?

MR. MILLS: In this case, Your Honor, the child has requested that her mother and father and her counselor and Barb Thorton from my office, who she's been working, with be present. That's because obviously the parents and the other two are our counselors and the person she's working with out of my office. She asked everyone else within the statute be excluded.

[99] MR. MCFETRIDGE: Judge, my position I guess is obviously have an objection to Mr. Mills' request for statutory exclusion given the age of the next witness. I don't think this should be selective.

However, if spectators are to be excluded I think it should be all spectators not just those spectators who do not in Mr. Mills' opinion somehow help the prosecution. Obvious detriment to the defendant and of course violation of his right to an open and public trial.

I think it should – in short I think it should be all other [sic] nothing, either all spectators excluded or none of them excluded. And noting the latter scenario courtroom is relatively uncrowded.

I would note that during the course of this trial I would suggest that spectators have behaved with decorum, with dignity. There have not been any outbursts that I've noticed. There has been no rudeness or displays of emotion.

If there are spectators including obviously the ones Mr. Mills has requested be permitted to remain I am sure they would not do anything in any sense to intimidate embarrass, harass this minor witness.

I would note that a number of people I don't – [100] do not know are seated in the courtroom.

Defendant's sister and mother are here. They have behaved so far with the utmost rectitude. I would certainly urge that they are not persons to somehow intimidate or harass the child witness.

MR. MILLS: Your Honor, I would suggest the statute doesn't say a darn thing about –

THE COURT: What's that number?

MR. MILLS: Oh, I'm sorry, 11-11, Your Honor.

The point is clearly [sic] that with a witness particularly in this case solely for sexual assault victims under 18 years of age with a young witness to a sexual offense the question is not whether or not they're standing up and yelling and screaming at her. Obviously the Court would control what was appropriate.

The point is incredibly difficult for anyone even an adult to testify about acts such as are alleged here and for a child this is doubly more so.

The statute the legislature has clearly allowed in the purpose of getting to the truth, which is of course what we're really about here today is to find out the truth. That we should take special precautions in regard to obtaining child testimony to [101] sexual offenses in regards to the fact that the victim requests the presence of certain persons whom she trusts. I would suggest that is [sic] clearly been the Court's discretion. Noting that in any child testimony case you obviously have things that have to be different from with an adult.

In this case you have a very young child of tender years. Taking away her only support during testimony is merely just guaranteeing that the court will not see child testimony. And it is not in any way prejudicial to the defendant. Obviously the defendant can even cross-examine concerning that. And I've seen it done in the past. I'm sure Mr. McFetridge has considered it whether he's decided to or not.

MR. MCFETRIDGE: A ridiculous connotation. I have no intention of doing as Mr. Mills ineloquently says it. I don't think it's appropriate to conjure up some sort of hybrid that Mr. Mills thinks is a good idea. The helpers

and so called supportive types can be in the courtroom, but nobody else can.

THE COURT: Well, who – who are the persons you asked to be present?

MR. MILLS: Your Honor, I would note the statute [102] says direct interest. Who has a more direct interest in this case other than the parents of the child?

THE COURT: That's what I'm asking. You mentioned two people. Who were those people?

MR. MCFETRIDGE: In the event that those persons named by Mr. Mills are permitted in the courtroom, Your Honor, my first preference would be that in that event the courtroom remain open.

As in the second and less favored alternative I would request that the defendant's sister and mother be permitted to remain. To my knowledge these are attractive and polite women who have never had any contact with the alleged victim in this cause and are not at all likely to create any kind of adversarial intimidating type atmosphere.

My second and less favored request is as follows; first of all these are Randy's relatives. They are people who are concerned about him. Concerned in this proceeding and have – and are continuing to provide him with a good deal of support, psychological and otherwise to which I think he also is entitled.

And quite candidly and pragmatically, Your Honor, as the trial lawyer in this cause have an interest in the jury observing that there are people here who [103] obviously care about the defendant. I'd be less than candid if I

didn't. And that for both those reasons I would request that they be permitted to remain. Preferrably [sic] that if a group of folks that Mr. Mills wants here are to be permitted in the courtroom remain open or in the alternative the back of the courtroom be completely empty.

MR. MILLS: Your Honor, I would note the State has absolutely no objection to the defendant's mother and sister being present when he testifies. He's not testifying now.

Direct interest, I have not seen any case law on what that means, Judge. I would suggest that it means in this case those persons who have direct interest in the case that obviously includes the defendant. He has direct interest because he's on trial. Other than that, Your Honor, the mother and sister have obviously an interest, but it is not direct. It is solely a derivative of Randall Dean White.

The difference with State's requested persons is that we are talking the mother and father of the child who's actually testifying at this time. And we're talking the counselor who has counseling and they do have particular duties in regards to this child. The [104] child is still undergoing therapy, will be after this trial. Obviously I would suggest she needs to see and observe the witness in her therapuetic [sic] capacity.

Barbara Thorton is the victim witness coordinator and this is precisely what she's here for that direct witness is working with the victims and witnesses in an attempt to minimize the impact of the trial system on such persons. And that she has a direct interest in this

case because she's the one that has been working with Shannon Grigsby.

THE COURT: Well, the statute leaves it up to the discretion of the Court. And the request has been made. I will permit the mother and father of the child to remain and the two counselors. But I'm also going to permit the mother and the sister of the defendant to remain. There are other strangers in the courtroom as well to this child including myself and the court reporter and the two uniformed deputies and so I don't think the fact that the two relatives of the defendant would remain in this rather large courtroom would in any way intimidate the child. There aren't that many other people here anyway. But I will permit those two people to stay along with the other two – well the two parents and the two [105] counselors.

MR. MILLS: Yes, Your Honor.

MR. MCFETRIDGE: Thank you, Your Honor.

THE COURT: So um, you're now going to call the child.

MR. MILLS: Yes, Your Honor.

THE COURT: Um, how do you want to proceed on the competency issue. You want to begin this before the jury comes in?

MR. MILLS: Believe that's up to the Court and counsel.

MR. MCFETRIDGE: May I have a second, Judge?

WHEREUPON, MR. MCFETRIDGE CONFERRED WITH HIS CLIENT.

MR. MCFETRIDGE: Judge, we would not be raising the competency of the witness.

THE COURT: All right.

MR. MILLS: Okay.

MR. MILLS: State's prepared to proceed then.

THE COURT: Would counsel approach the bench please.

WHEREUPON, A SIDE BENCH CONFERENCE WAS HELD OFF THE RECORD; SUBSEQUENT TO WHICH THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:

THE COURT: At this time out of the presence of [106] the jury the State has indicated that its next witness is Shannon Grigsby who as I understand it just turned five years of age and who was four years, 9 months or some approximate age at the time of the alleged incident. And Mr. McFetridge has just indicated that he does not intend to raise any competentcy [sic] issue at this time; is that correct?

MR. MCFETRIDGE: Yes, Your Honor that's correct.

THE COURT: All right. So with that on the record and with that understanding then you can call the jury back in.

MR. MILLS: Your Honor, would just ask that the record refelct [sic] I believe Mr. McFetridge did talk to his client prior to making that decision.

MR. MCFETRIDGE: That is correct, Your Honor. There were certain tatical [sic] considerations that went into that decision. I should, however, rely on his approval.

MR. MILLS: Thank you.

THE COURT: All right. Call the jury in please.

WHEREUPON, THE JURT [sic] RETURNED INTO OPEN COURT.

THE COURT: Call your next witness.

MR. MILLS: People call Shannon Grigsby.

Could we have a moment outside.

[107] THE COURT: Yes.

MR. MILLS: Your Honor, the people would ask to change the order and call Terry Lewis at this time.

MR. MCFETRIDGE: No objection.

* * *

Excerpt of Prosecutor's Decision
Not to Call Shannon Grigsby.

[Vol. VI; R. 122]

* * *

[122] MR. MILLS: Your Honor, we would be attempting to recall Shannon at this time.

[123] MR. MILLS: Your Honor, I think at this time we will be requesting a recess until tomorrow. We will not be calling Shannon Grigsby. The other witness cannot be here until tomorrow morning.

* * *

Excerpt of Hearing on Motion for Mistrial.

[Vol. VII; R. 3]

* * *

[3] THE COURT: Are you ready to proceed?

MR. MILLS: Yes, Your Honor.

MR. MCFETRIDDGE [sic]: Yes, Your Honor. Judge, at this time outside the presence of the jury I'd be making a motion for mistrial. Would note that late yesterday afternoon the alleged victim in this cause Shannon Grigsby was presented to the jury in the arms of a man who, ostensibly the father of the child. She did not testify allegedly because of emotional hiatus of some sort. I would suggest, however, that her presence, failure to testify, and the exhibition this if you will it is prejudicial and operated to deprive Mr. White of a fair impartial jury.

MR. MILLS: Your Honor, I would suggest that the mere fact that the victim of the offense had an emotional difficulty in coming into the courtroom is neither surprising or sufficiently prejudicial to cause a mistrial.

The mere fact that even a plaintiff in a civil case starts sobbing does not necessarily mean that there is sufficient prejudice to the defendant in a civil case.

[4] I would suggest that in this type of a case it would be substantial evidence. We've already taken the fact that it would not be a usual response on coming to court even for adult witnesses, but just that one fact does not make it sufficient to grant a mistrial at this time.

Suggest there is nothing else in this record that tends to support the necessity for a mistrial and it is unfortunately just one of those things that sometimes happens in a trial.

THE COURT: Do you have anything further or any authority or any –

MR. MCFETRIDGE: No, Your Honor.

THE COURT: Well, although the situation does – is a type situation that concerns the Court, because the jury of course is watching this type of thing. I don't think that what happened yesterday justifies a mistrial. I don't think it was staged. If I thought it was staged I would certainly perhaps consider otherwise. I don't think it was and therefore I'm going to deny the motion. However, I do think that if – if the State intends to call this child again that she not be brought into the courtroom until you are certain that she or certain as they can be that she's [5] going to testify.

MR. MILLS: Yes, Your Honor.

THE COURT: So the motion will be denied.

MR. MCFETRIDGE: Thank you, Your Honor.

THE COURT: You want to call the jury, please.

* * *

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* * *

[10] MR. MCFETRIDGE: Again would object on hearsay grounds, Your Honor.

MR. MILLS: Your Honor, tendered as spontaneous declaration within three and a half hours and as statement made for medical purposes to be turned over to the physician for treatment diaganosis [sic] particularly considering the nature of that taken separately from the physician who has already testified to talking to the child himself.

THE COURT: Objection overruled.

* * *

Excerpt of Motion for Directed Verdict.

[Vol. VII; R. 17]

* * *

[17] THE COURT: Mr. McFetridge.

MR. MCFETRIDGE: Thank you, Your Honor. At this time, Your Honor, I would make a motion for directed verdict. I would note that the State has now rested. There is an utter lack of any physical evidence of [18] sexual abuse case.

It is incumbent that the proof be corroborated or be clear and convincing. Here of course we've have [sic] no testimony whatsoever of the alleged victim in this cause. We have had a number of other people testify as to what she supposedly told them. However, again it's been uncorroborated.

There's not been a scintilla of any sign of physical evidence indicating any kind of abuse let alone at the time that Randy White is alleged defendant other than the very brief eyewitness by the baby sitter and again remotely by Shannon Grigsby.

I would urge that this is against all of these charges. Evidence is entirely insufficient to support a conviction. I would ask that the matter be – that Your Honor enter a directed finding at this time thank you.

MR. MILLS: Your Honor, I would cite the Court to case of *People vs. Fiber* 119 Illinois 2nd 760 and *People vs. Merridith* 105 Illinois Decisions 1226 both cases previously provided to the Court and counsel on another matter.

Particularly in *Fiber* I would note that in that case the sole evidence of guilt was the [19] statement made – spontaneous declaration made by the child to the mother and by the child to the nurse.

Noted on page 763 that is the only evidence in that case and that based upon that case was sufficient to prove beyond a reasonable doubt and sufficient to be supported on appeal which I would suggest clearly shows sufficient to get past directed verdict.

In *Merridith* Your Honor, they basically had three spontaneous declarations to a police officer, to a 14 year old girl, and to the mother. The only other evidence is some redness that was observed by the mother in *Merridith* I would note we have virtually the same thing here. The spontaneous declaration immeidately [sic] thereafter, incredibly consistent throughout. The injury to the neck,

injury to the mouth noted by Officer Lewis, the redness that was noted by Tammy Grigsby to vagina is clearly consistent with the victim's previous statements.

Would suggest clearly based upon the case law and the standard the Court is to consider it's up to the jury to decide whether it's beyond a reasonable doubt and a rational finder of fact could find that this evidence is proved beyond a reasonable doubt.

[20] THE COURT: Mr. McFetridge, do you have anything?

MR. MCFETRIDGE: Nothing further, Your Honor.

THE COURT: Well in this case, although the child has not testified, with the declarations that were admitted and with the other evidence that has been presented, and based on the standards of course that are to be applied in deciding motions for directed verdict, and also based on the particularly – the *Merridith* case, which although of course not on all fours is certainly very similar to this case in many respects as far as the facts and as far as some of the evidentiary issues. Based on all that the motion will be denied.

* * *

NO. 4-88-0954

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RANDALL D. WHITE, Defendant-Appellant.	Appeal from Circuit Court County of Vermilion No. 88CF80 Honorable John P. O'Rourke, Judge Presiding. (Filed: June 15, 1990)

JUSTICE STEIGMANN delivered the opinion of the court:

After a jury trial, defendant, Randall White, was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint (Ill. Rev. Stat. 1987, ch. 38, pars. 12-14, 19-3, 10-3). On appeal, defendant contends that the admission of testimony containing certain out-of-court statements by the alleged victim was error. Defendant also argues that if his convictions are affirmed, the case should be remanded for resentencing because the trial court permitted the State to present inadmissible evidence regarding defendant's alleged criminal behavior as a factor in aggravation.

We affirm.

The four-year-old alleged victim, S.G., did not testify at trial. Instead, five witnesses were permitted by the court to testify as to statements made to them by S.G.

Those witnesses were Tony DeVore, S.G.'s baby-sitter; Tammy Grigsby, S.G.'s mother; police officer Terry Lewis; nurse Cheryl Reents; and Dr. Michael Meinzen. The testimony of each of these witnesses will be discussed in detail, as will the circumstances under which S.G. spoke to each witness.

The events relevant to the offenses charged occurred on April 16, 1988, at 4 a.m. in the home of S.G., while Tony DeVore was baby-sitting for S.G. and S.G.'s three-year-old brother, Eric. DeVore, who was fourteen, was awakened by S.G.'s scream, went to the victim's bedroom, and saw the defendant exit that room and then the residence.

At trial, DeVore testified that she asked S.G. what happened, and S.G. told her. Defense counsel's objection to DeVore's testifying as to what S.G. told her was overruled on the ground that S.G.'s statements were spontaneous declarations and therefore admissible as an exception to the rule against hearsay. DeVore's testimony continued as follows:

> "Q. [By prosecutor:] Okay. What did [S.G.] say at that point?
>
> A. When I went in there she said he put his hand over her mouth. He'd been choking her. And she told me that he was touching her in the wrong places and he also said that if she screamed then he would whip her and then call me up there to whip her.
>
> Q. Okay. Now, as best you recall what did [S.G.] say he or did she identify the person or what?
>
> A. She said – well, first she said his name, Randy.

> Q. Okay.
>
> A. And then she went on with he. [sic]
>
> Q. Okay. Start off with Randy? A. Yeah.
>
> Q. Okay. Now, you said – you testified that she said he touched her in wrong places. How did she phrase that as best you recall?
>
> A. She said – she said, 'He was touching me.' And when I asked where she point [sic] to her private places.
>
> Q. Okay. And [I] ask you could you describe where she pointed?
>
> A. To the lower part of her body.
>
> Q. Okay. And – [.]
>
> [The defendant's continuing hearsay objection was overruled.]
>
> Q. Do you know the name for the portion of the anatomy for what you talked about?
>
> A. Yes, I do.
>
> Q. What was she pointing to?
>
> A. The vaginal area."

DeVore testified that after she tried to comfort S.G., "she finally calmed down and she quit crying a little bit."

According to DeVore, Tammy Grigsby, the victim's mother, arrived home approximately 30 minutes after the incident. DeVore spoke very briefly to Grigsby, who then sat with S.G. and asked her exactly what happened. Defense counsel's objection to Grigsby's testifying about what S.G. told her was overruled for the same reason that the objection as to DeVore's testimony was overruled. Grigsby testified that S.G.'s response to her question was as follows:

"A. She said she woke up and that Randy was in the room. And that he had put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony [DeVore] would whip her too. And then she said that he put his mouth on her front part.

* * *

Q. [By prosecutor:] And did you clarify what she meant by that?

A. What do you mean? I – yeah, I asked her exactly, you know, what he did. And she told me that he had pulled her pants down a little bit and put his mouth down there and – ."

Grigsby described her daughter as appearing scared and a "little hyper." Grigsby testified that she noticed "bruises or red marks" on S.G.'s neck that were not present when Grigsby left the residence earlier that evening.

Immediately after this short conversation with her daughter, Grigsby called the police. She testified that Officer Terry Lewis of the Georgetown Police Department arrived "just a few minutes" after she called. Lewis testified that he arrived at S.G.'s home around 4:47 a.m. He asked to speak to S.G. privately, and Grigsby had no objection. Grigsby testified that at the suggestion of Officer Lewis, she checked S.G.'s "front part" (the term Grigsby said S.G. uses for this part of her body), and Grigsby noticed that it was a "little red."

Lewis questioned S.G. by herself in the kitchen. He first spoke with S.G. about cartoons in order to "[get] her at ease." At first she seemed upset and nervous, although she was very cooperative. The officer's testimony as to what the victim told him was essentially identical to the

testimony given by DeVore and Grigsby, with the addition of the following:

"A. She went on and she started talking about her pants being wet.

Q. [By prosecutor:] Okay.

A. And when I referred to them as pants she advised me they were not pants they are underwear. And that they were wet. I asked if she had peed in her pants and she got disgusted with me and said, 'I don't pee in my pants, my underwear' she said.

Q. Uh-huh.

A. And she said Randy done it. So I asked her then I said how did Randy make them wet. And she told me that he had pulled her pants to one side and used his tongue on her private parts, what she called her private parts."

Defendant objected to all of Lewis' testimony about what S.G. had told him, but the court overruled that objection, indicating that this testimony was also being admitted as a spontaneous declaration.

Lewis also testified that he noticed a "small cluster of scratches" on the right side of S.G.'s mouth. They appeared to be "very fresh cuts." He said S.G. also had two long, parallel, fresh scratches on the left side of her neck. She told Lewis that "Randy" had done that to her when he had his hand on her. Lewis took a color Polaroid photograph of S.G. around 6 a.m. Lewis testified that the photograph showed the scratches he testified about. The photograph was admitted into evidence.

Cheryl Reents testified that she was working as an emergency room nurse when she interviewed S.G. shortly

after 8 a.m. that same morning, April 16, 1988. Reents testified that she asked questions of S.G. in order to obtain a history to assist herself and the attending emergency room physician in making a diagnosis and providing treatment. When the State asked Reents what S.G. told her after Reents asked S.G. what happened, defense counsel again objected. In response, the State argued that S.G.'s statements to Reents were admissible both as spontaneous declarations as well as statements made for medical purposes under section 115-13 of the Code of Criminal Procedure of 1963 (Code) (Ill. Rev. Stat. 1987, ch. 38, par. 115-13). The court overruled the objection. and Reents testified that S.G. told her, *inter alia*, the following:

> "A. Okay. Then I asked if he touched her anywhere else [besides her mouth and neck]. And she said yes. And I asked her where. And she said, 'On my front part.' And then for clarification I asked her to point where. And the patient pointed to the mons area.
>
> Q. [By prosecutor:] Okay. And that's what?
>
> A. That's the genital, the labia majora and the surrounding tissue in the genital area.
>
> Q. On the female?
>
> A. Yes, on the female. Okay. And I – then I, for more clarification, I asked her what he touched her with. And she stated his mouth. And then I asked her if he touched her with anything else. She said no. Then I asked her if he touched her with his front part and she stated no. I asked her if he touched her back – her back part. And she said no. And then I asked her if he made her touch him. She said no. Then I asked her if he made her put her mouth anywhere. She said no. And then I asked if

> anything was put inside of her. She said no. And I asked if it had ever happened before and she said yes when it was cold out.
>
> Q. Okay.
>
> A. And then she continued to say that he put his mouth on her, but he didn't hurt her that time."

Initially, S.G. would not look at Reents, but instead looked down at her ID bracelet as she twisted the bracelet around her wrist. Later, S.G. was cooperative and answered Reents' questions. Reents testified that in questioning S.G., Reents phrased her questions "very open ended to just let [S.G.] just say whatever." Reents also noticed some bruising on the left side of S.G.'s neck.

Dr. Michael Meinzen testified that he was the physician on duty at the hospital emergency room to which S.G. was brought. Meinzen said he spoke with S.G. shortly after 8 a.m. in order to obtain a history from the patient for the purposes of making a diagnosis and treating her medically if that was needed. Meinzen attached great importance to obtaining a history from a patient, noting that, "in medicine we're taught that 90 percent of our diagnosis is based on the history. You listen to what the person tells you and then decide where to go from there, what areas to focus on."

Meinzen was asked to testify about what S.G. had told him, and defense counsel objected. The State again urged two separate grounds for the admissibility of this testimony – spontaneous declaration and section 115-13 of the Code – and the court overruled the objection.

Meinzen then testified that after S.G. told him "Randy" awakened her, she told him the following:

> "A. * * * [W]e asked her to direct attention to what – where was it that she was touched. She said he put his hands over her mouth and on her neck. And asked what else happened. And she said that he put his mouth down there. We tried to get her to be more specific. And asked her to point and touch where exactly he had placed his mouth. And she pointed in the – in the area of her external genitalia.
>
> Q. [By prosecutor:] All right.
>
> A. At that point asked her was she hurt anywhere. And she didn't state that she was in any pain at that particular time. She was rubbing an area on her neck that initially then we directed her attention elsewhere and she didn't seem to be holding that area too much more. Specific questions then that we asked was she hurting anywhere in her genital area. And breaking it down you know into children's terms pointing and asking her specifically where she pee-pee and where she pointed was she hurting anywhere there. And she said no that she wasn't. We asked had anything put in they're [sic]. Had he put any finger in or any other things. She said that nothing had been pushed into her. And we encourage her to identify her anatomy a little bit more so we knew what we were talking about.
>
> Q. Okay.
>
> A. Then asked her a lot of these questions were asked very slowly to make sure that she understood what we were talking about. And, you know, case was such she just said that only that he placed his mouth over her external genitalia and just pointed in that general region. We asked whether she had had to touch him anywhere. Whether she had to place her mouth or anything on any of his parts. And she said that she had not."

The physician described S.G. as "calm and comfortable" when he spoke to her.

As stated earlier, the alleged victim, S.G., did not testify. The entire State's case consisted essentially of the testimony of the witnesses as described earlier in this opinion. Defendant's challenge to the admissibility of their testimony concerning what S.G. told them requires us to consider, in turn, three separate evidentiary issues: (1) spontaneous declarations; (2) statements to medical personnel under section 115-13 of the Code; and (3) the claim that these hearsay exceptions are invalid unless the prosecution produces the declarant for cross-examination or demonstrates that the declarant is unavailable.

I. SPONTANEOUS DECLARATIONS AS AN EXCEPTION TO THE HEARSAY RULE

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible as a hearsay exception. (M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.3, at 550 (4th ed. 1984).) This "spontaneous declaration" exception to the hearsay rule was explained by the Illinois Supreme Court in *People v. Poland* (1961), 22 Ill. 2d 175, 174 N.E.2d 804, where the court stated the following:

> "There has emerged, as a recognized exception to the hearsay rule, the principle that,

under certain conditions, what have been variously characterized as 'spontaneous declarations' or 'excited utterances' are properly admissible as an exception to the hearsay rule. Perhaps the classic statement of the reason underlying this exception is that of Wigmore (6 Wigmore, Evidence, 3d ed., sec. 1747):

'This general principle is based upon the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.'

The rule has been succinctly stated by the Supreme Court of California: 'When a declaration is made under the immediate influence of the occurrence to which it relates and so near in time as to negative any probability of fabrication, said declaration is admissible.' *Showalter v. Western Pacific Railroad Co.*[,] 16 Cal.2d 460, 106 P.2d 895, 899.

Three factors are necessary to bring a statement within this exception to the hearsay rule: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence. (6 Wigmore, Evidence, 3d ed. sec. 1950; Cleary, Handbook of Illinois Evidence, sec. 13.28)." *Poland*, 22 Ill. 2d at 180-81, 174 N.E.2d at 806-07.

The Illinois Supreme Court recently had occasion to consider the spontaneous declaration exception to the hearsay rule in a case similar to this one. In *People v. Nevitt* (Mar. 29, 1990, Docket No. 67756), ___ Ill. 2d ___, ___ N.E.2d ___, the supreme court reviewed a case in which the defendant was convicted of aggravated criminal sexual assault upon a three-year-old child, J.B. As stated by the supreme court, one of the issues before it was "whether an interval of as much as five hours between an alleged incident of sexual abuse and a three-year-old child's out-of-court declaration to his mother concerning the alleged incident precludes the statement's admission under the excited utterance exception to the hearsay rule despite other indicia of reliability[.]" *Nevitt* (Mar. 29, 1990. Docket No. 67756, slip op. at 1), ___ Ill. 2d at ___, ___ N.E.2d at ___.

In *Nevitt*, J.B.'s mother gave J.B. his customary morning bath before taking him to his day-care and educational center for the day. While bathing J.B., his mother checked him from head to toe, including his genital area, for diseases, scratches, and sores, but found nothing out of the ordinary. His mother testified that on arrival at the day-care center, she escorted her son to his classroom and placed his hand in the hand of the defendant, Nevitt.

When she picked up her son at approximately 3 p.m. that same day, he appeared withdrawn. He did not come

up to greet her, nor did he say anything to her on their trip home. After arriving at home, J.B. did not eat his afternoon snack with his usual enthusiasm. His mother asked him what was wrong. J.B. blurted out, " 'Teacher Tony bit my dingdong.' " (*Nevitt* (Mar. 29, 1990, Docket No. 67756, slip op. at 2), ___ Ill. 2d at ___, ___ N.E.2d at ___.) J.B. then demonstrated with an object what had occurred earlier that day.

J.B.'s mother then summoned her mother, who resided in a downstairs apartment. Both women then inspected J.B.'s penis and noted " 'a pinkish coloration around the head.' " about the size of a dime. (*Nevitt* (Mar. 29, 1990, Docket No. 67756, slip op. at 2), ___ Ill. 2d at ___, ___ N.E.2d at ___.) When the grandmother touched the boys penis, he "hollered 'ouch' and 'it's sore.' " *Nevitt* (Mar. 29, 1990, Docket No. 67756, slip op. at 2), ___Ill. 2d at ___, ___ N.E.2d at ___.

Based upon the testimony of J.B.'s mother concerning what J.B. told her, as well as other evidence presented by the State, including defendant's written admission to performing the acts in question, Nevitt was convicted. The appellate court reversed his conviction and remanded for a new trial, finding that the prosecution failed to provide a proper foundation for J.B.'s mother's identification of defendant as "Teacher Tony." (*People v. Nevitt* (1988), 174 Ill. App. 3d 326, 528 N.E.2d 307.) Because of this lack of foundation, the appellate court held that J.B.'s out-of-court statement to his mother was inadmissible.

The State appealed that decision and the defendant requested cross-relief from the supreme court. Defendant argued that both the trial and appellate courts erred

when they found that J.B.'s out-of-court statement to his mother met the requirements of the excited-utterance exception to the hearsay rule. The supreme court reversed the appellate court and stated the following:

> "Defendant argues that the time period between the alleged incident and the child's statement to his mother demonstrates that the declaration was not spontaneous. Defendant points out that the child said nothing to his mother when she picked him up at [the day-care center], during the drive home and for a time after they arrived. Defendant also notes that the child made the statement in response to his mother's questioning and that the statement occurred as long as five hours after the alleged incident. Finally, defendant argues that J.B.'s out-of-court statement to his mother is so ambiguous that it cannot be said that the declaration related to the circumstances of the occurrence.
>
> This court has recognized a number of exceptions to the rule prohibiting the admission of hearsay evidence, finding that the statements which fall within the exceptions, and are therefore admissible, demonstrate sufficient guarantees of reliability or trustworthiness despite the inability of an opponent to cross-examine the declarant before the trier of fact. (See, *e.g.*, *People v. Clark* (1972), 52 Ill. 2d 374, 389.) As defendant notes, one of the factors to consider in determining the admissibility of a hearsay statement under the spontaneous declaration exception is the absence of time to fabricate. See *People v. Poland* (1961), 22 Ill. 2d 175, 181.
>
> As defendant points out, the time that elapsed between the incident and the declaration here would generally render the statement inadmissible hearsay. However, given the circumstances present in this case,we find that the

trial judge's ruling that three-year-old J.B.'s statement was reliable and within the excited utterance exception to the hearsay rule was not an abuse of discretion. See *People v. Shum* (1987), 117 Ill. 2d 317, 343 ('time factor is an elusive element and will vary with the facts of the case'); M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.3, at 552 (4th ed. 1984) ('Lapse of time is but one factor to be considered by the court in reaching an answer [of whether the statement is an excited utterance] in the particular case. Other factors include the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest').

We believe that the evidence at trial sufficiently demonstrates that the child's statement was the product of the event, rather than the child's deliberation. J.B.'s behavior demonstrated the effect the incident had on the child. Although he usually greeted his mother with outward affection, he was on this occasion quiet and withdrawn. He remained uncharacteristically silent during the two-block drive from [the day-care center] and upon his arrival at home. His unusual behavior continued through the afternoon snack. The first time J.B. had an opportunity to relate the incident to anyone away from the environment in which the incident occurred was when his mother picked him up from the center. Although he said nothing about the incident during the drive to his home, his first statement to his mother related to the incident. At that time, according to his mother, the child was still visibly upset and withdrawn. Under the circumstances here, it is not unreasonable to believe that the mother's question to her three-year-old son, asking him 'what's wrong,' elicited an unreflected and spontaneous declaration concerning an incident

that occurred earlier in the day. (*Cf. People v. Gacho* (1988), 122 Ill. 2d 221, 241 (declaration 6½ hours after occurrence was spontaneous when victim confined in trunk in seriously wounded condition and utterance was given in response to question on first opportunity for victim to speak).) We find no evidence that would explain a motive for the child to fabricate the statement, and the terminology contained in the child's declaration substantiates its reliability. (See *State v. Ryan* (1984), 103 Wash. 2d 165, 691 P.2d 197 (whether language of statement was likely to have been used by a child the age of declarant important in determination of statement's reliability).) That the statement came in response to a question put to him by his mother does not affect its credibility. The question was not suggestive and only prompted J.B. to speak." Nevitt (Mar. 29. 1990, Docket No. 67756. slip op. at 9-11), ___ Ill. 2d at ___, ___ N.E.2d at ___.

In the present case, defendant concedes that the statements S.G. made to DeVore, S.G.'s baby-sitter, meet the criteria for admission as spontaneous declarations. Defendant argues, however, that S.G.'s statements to Grigsby (S.G.'s mother) and to Officer Lewis, nurse Reents, and Dr. Meinzen do not meet those criteria. We will address this argument only with regard to S.G.'s statements to Grigsby and Lewis. Because we find that S.G.'s statements to Reents and Meinzen were properly admitted under section 115-13 of the Code (as discussed in the next section of this opinion), we need not consider whether those statements might also be admissible as spontaneous declarations.

S.G.'s statements to DeVore about the incident occurred literally within moments of DeVore's seeing

defendant flee the scene of the crime he allegedly had just committed. About 30 minutes after S.G.'s statements to DeVore, S.G.'s mother, Grigsby, returned home, and S.G. told Grigsby what had happened. Grigsby then called the police, and Officer Lewis arrived "just a few minutes" after she called. In the kitchen of her home, S.G. spoke to Lewis with no one else present. On this record, it appears that these three separate statements of S.G. were all made within 45 minutes of her being sexually assaulted in her bed.

Defendant argues that S.G.'s statement to Grigsby was not a spontaneous declaration because S.G. had "calmed down" and was no longer reacting to a startling occurrence. Defendant cites other factors as being inconsistent with S.G.'s statements being spontaneous declarations, such as Grigsby's urging her daughter "to tell me what happened" and that S.G. was initially reluctant to do so. With regard to S.G.'s statements to Lewis, defendant makes these same arguments.

In *People v. Harris* (1985), 134 Ill. App. 3d 705, 480 N.E.2d 1189, the court discussed the factors which should be considered in deciding whether a statement qualifies as a spontaneous declaration and stated the following:

> "Whether a statement was sufficiently spontaneous to qualify for admission and evidence under this exception to the hearsay rule is a preliminary question for determination by the trial court. [Citation.] The court's ruling will be held an abuse of discretion only if the statements are not so intimately connected with the event as to indicate a lack of premeditation.
>
> [Citation.] In deciding whether the declarant acted without thought, the court is required to

consider all the circumstances surrounding the making of the statement.

[Citation.] The time which elapsed between the occurrence and the declaration and the distance which the declarant travelled from the scene before making the declaration are both material in determining spontaneity. However, neither factor is controlling.

[Citation.] Also. the fact that the statement was made in response to a question will not itself deprive an utterance of the requisite spontaneity to establish its admissibility. Thus, statements made in response to general inquiries as to what has occurred may nevertheless be spontaneous." *Harris*, 134 Ill. App. 3d at 711, 480 N.E.2d at 1194-95.

We also agree with the following remarks from *People v. Bitler* (1986), 146 Ill. App. 3d 477, 497 N.E.2d 137, which dealt with out-of-court statements by declarants of tender years who did not testify at trial:

"The trial court must look to the surrounding circumstances to determine whether there was an opportunity for reflection and invention. [Citation.]

Illinois courts have recognized that special circumstances exist concerning the motivations behind the statements of very young children. The reason that their statements are admitted is that it is unlikely that a child of tender years will have any reason to fabricate stories of sexual abuse. (*In re Marriage of Theis* (1984), 121 Ill. App. 3d 1092, 460 N.E.2d 912; *People v. Chatman* (1982), 110 Ill. App. 3d 19, 441 N.E.2d 1292.) In Wisconsin, the courts have noted that the stress of a sexual assault upon a child will remain with the child long after it occurred, and that the child's statements will be unfabricated for three

reasons: (1) the child is apt to repress the incident; (2) it is often unlikely the child will discuss such a stressful incident with anyone but the mother; and (3) the characteristics of young children work to produce declarations free of conscious fabrication for a longer period after the incident than adults. *State v. Padilla* (Wis. App. 1982), 110 Wis. 2d 414, 329 N.W.2d 263.

We agree here, as we did in *Theis*, with the *Padilla* court's analysis; and we find that the victims had neither the time nor the opportunity to fabricate the statements, even assuming, *arguendo*, that the defendant molested the victims 24 hours prior to the relevant statements." *Bitler*, 146 Ill. App. 3d at 481-82, 497 N.E.2d at 139.

Based on the foregoing authority, we find defendant's arguments to be unpersuasive. The trial court has considerable discretion in determining whether a statement is admissible as a spontaneous declaration, and its decision will not be reversed absent an abuse of that discretion. (*Bitler*, 146 Ill. App. 3d at 481, 497 N.E.2d at 139.) On the facts in this case, the trial court did not abuse its discretion in deciding that S.G.'s statements to DeVore, Grigsby, and Lewis were all spontaneous declarations and admissible.

II. STATEMENTS UNDER SECTION 115-13 AS AN EXCEPTION TO THE HEARSAY RULE

As noted earlier, the trial court permitted nurse Reents and Dr. Meinzen to testify as to statements S.G. made to them. When defense counsel objected to their testimony on the grounds that it would be hearsay, the State responded that the testimony was proper on the

grounds that the statements of S.G. were (1) spontaneous declarations, and (2) made to medical personnel for purposes of medical diagnosis or treatment, and thus admissible under section 115-13 of the Code (Ill. Rev. Stat. 1987, ch. 38, par. 115-13). Section 115-13 of the Code reads as follows:

> "In a prosecution for violation of Section 12-13, 12-14, 12-15 or 12-16 of the 'Criminal Code of 1961', statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

That section was added to the Code on January 1, 1988, and the only reported decision of which we are aware in which the Illinois Supreme Court or the Illinois Appellate Court construes it is the decision of this court in *People v. Rushing* (1989), 192 Ill. App. 3d 444, 548 N.E.2d 788.

In *Rushing*, the defendant argued that the testimony of the physican [sic] who examined and spoke with the nine-year-old complainant in that aggravated criminal sexual abuse case improperly included details of the alleged offense that were not relevant to the complainant's diagnosis and treatment. The physician's examination occurred approximately one month after the alleged incident of sexual abuse. The physican [sic] testified the complainant told the physican [sic] that the defendant (whose name the physician mentioned) told complainant not to tell anyone; that if she did tell, he would go to jail, and when he got out, he would kill her mother and

father. (*Rushing*, 192 Ill. App. 3d at 447, 548 N.E.2d at 790.) This court rejected defendant's argument and stated the following:

> "In examining and treating such complaints of a nine-year-old girl suspected of sexual abuse, details of the sexual acts were certainly pertinent. Under the same circumstances, the threat was relevant to D.B.'s [the victim's] state of mind and emotional condition. All the statements were relevant in determining the approximate time of the alleged act and to the credibility of D.B. These are all matters which would reasonably be considered and relied upon by medical personnel in making any diagnosis or conclusion as to a patient's condition and proper course of treatment. Thus, the statements were also admissible under section 115-13." *Rushing*, 192 Ill. App. 3d at 453, 548 N.E.2d at 793-94.

As this court indicated in *Rushing*, we hold that section 115-13 of the Code evinces a legislative intent that the phrase "descriptions * * * insofar as reasonably pertinent to diagnosis or treatment" should be liberally construed. The legislature directed that statements containing such descriptions *shall* be admissible. A crabbed interpretation of that phrase, requiring trial courts to parse statements made by a victim when a medical history is taken, would be inconsistent with legislative intent.

The testimony of nurse Reents and Dr. Meinzen describing the questions they asked of S.G. and the reasons why those questions were asked makes clear that the statutory prerequisites for this new hearsay exception were met. Meinzen especially emphasized the importance

of taking a history from the patient in order to properly make a diagnosis and decide upon further treatment, if any.

Defendant also argues that S.G.'s statements to Meinzen and Reents concerning the details of the incident do not fall within the treating-physician exception to the hearsay rule. Citing *People v. Walton* (1976), 43 Ill. App. 3d 74, 356 N.E.2d 1131, defendant claims that while a treating physician may testify about a patient's statements concerning presently existing bodily conditions, the doctor may not relate the patient's statements which concern details of the alleged offense. We disagree. We conclude that section 115-13 was designed, in part, to sever the artificial restraints heretofore imposed by case law on the ability of a physician to testify about what his or her patient told the physician for purposes of medical diagnosis or treatment.

To the extent that *Walton*, an opinion of the Second District Appellate Court, is inconsistent with this holding, we decline to follow it. Section 115-13 of the Code was enacted 12 years after *Walton*, and its enactment implicitly overrules that case.

III. DEFENDANT'S CLAIM THAT THE DECLARANT MUST BE "UNAVAILABLE" OR PRODUCED BEFORE THE DECLARANT'S OUT-OF-COURT STATEMENT MAY BE ADMITTED AS AN EXCEPTION TO THE HEARSAY RULE

Defendant argues that even if the witnesses to whom S.G. spoke could properly testify to what S.G. told them under traditional or statutory exceptions to the hearsay

rule, that testimony nonetheless violated his right under the sixth amendment to the United States Constitution to be confronted with the witnesses against him. Citing *Ohio v. Roberts* (1980), 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, defendant argues as follows:

> "[E]ven where the evidence falls within a firmly rooted hearsay exception, the prosecution still must either produce the declarant for cross-examination or demonstrate that he is unavailable. * * * Since the prosecution neither produced the declarant [S.G.] for cross-examination nor established that she was unavailable, Randall White was denied his Sixth Amendment right to confront the witnesses against him."

In making this argument, defendant's counsel on appeal inexplicably fails to cite or discuss *United States v. Inadi* (1986), 475 U.S. 387, 89 L. Ed. 2d 390, 106 S. Ct. 1121, in which the United States Supreme Court repudiated the interpretation of *Roberts* upon which defendant relies. Nor does counsel cite or discuss *People v. Ingram* (1987), 162 Ill. App. 3d 257, 515 N.E.2d 1252, a decision of this court which analyzed both *Roberts* and *Inadi*. The Court in Inadi said the following:

> "We granted certiorari, [citation], to resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E) [the coconspirator exception to the hearsay rule]. We now reverse.
>
> The Court of Appeals derived its rule that the Government must demonstrate unavailability from our decision in *Roberts*. It quoted

> *Roberts* as holding that 'in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case * * * the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.' 448 U.S., at 65[, 65 L. Ed. 2d at 607, 100 S. Ct. at 2538]. The Court of Appeals viewed this language as setting forth a 'clear constitutional rule' applicable before any hearsay can be admitted. 748 F.2d at 818. *Under this interpretation of Roberts, no out-of-court statement would be admissible without a showing of unavailability.*
>
> *Roberts, however, does not stand for such a wholesale revision of the law of evidence,* nor does it support such a broad interpretation of the Confrontation Clause. *Roberts* itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay. * * * *Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: 'the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.' [Citation.]
>
> The Confrontation Clause analysis in *Roberts* focuses on those factors that come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. See Fed. Rule Evid. 804(b)(1). In particular, the *Roberts* Court examined the requirement, found in a long line of Confrontation Clause cases involving prior testimony, that before such statements can be admitted the government must demonstrate that the declarant is unavailable. [Citations.] All of the

cases cited in *Roberts* for this 'unavailability rule' concern prior testimony. * * *

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. * * * *Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."* (Emphasis added.) *Inadi*, 475 U.S. at 391-94, 89 L. Ed. 2d at 396-98, 106 S. Ct. at 1124-25.

The above-quoted language from *Inadi* makes clear that the decision in *Roberts* must be restricted to the factual context in which *Roberts* arose, *i.e.*, "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial." (*Roberts*, 448 U.S. at 58, 65 L. Ed. 2d at 602, 100 S. Ct. at 2535.) The discussion in *Roberts* of hearsay exceptions unrelated to the particular exception which the State in that case was arguing was wholly unnecessary to the decision reached. Indeed, that discussion may be the "Sistine Chapel" of *obiter dicta*.

Because of the uncertainty that *Roberts* caused regarding the application of exceptions to the hearsay rule, it is necessary that we be clear and emphatic in our holding on this point: Whether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule. The only exception to this holding is the factual situation present in *Roberts*, *i.e.*, the use at trial of the previous testimony of a witness who is no longer available.

We provide the foregoing emphasis because, despite the clear language of *Inadi*, we conclude the decisions of other courts have not given full effect to *Inadi's* repudiation of the *dicta* in *Roberts*. For instance, in *Nelson v. Farrey* (1989), 874 F.2d 1222, the United States Court of Appeals for the Seventh Circuit had occasion to consider the effect of *Inadi* upon *Roberts* and stated the following:

> "Six years [after *Roberts* was decided] the Supreme Court disavowed any suggestion that *Roberts* had stated a general rule, confined the case to the particular situation presented by it – a prosecutor's attempt to use the transcript of testimony from a previous judicial proceeding in lieu of live testimony at trial – and allowed the admission of out-of-court statements by a co-conspirator who was available to testify. [Citation.]
>
> At present, then, there is no single authoritative criterion for when the admission of hearsay evidence violates a defendant's constitutional right to confrontation." *Nelson*, 874 F.2d at 1227.

Nelson concerned a prosecution for a sex offense. Judge Flaum wrote a concurring opinion in *Nelson* in which he specifically disagreed with the majority assertion that the unavailability of the complainant was not a constitutional "sine qua non of allowing her out of court statements to be used in evidence against her father." (*Nelson*, 874 F.2d at 1230 (Flaum, J., concurring).) Judge Flaum opined that the confrontation clause required the prosecution to show that the complainant was not available to testify at trial. He concurred because he believed the prosecution had done so. He also made the following observations:

"The general language contained in *Roberts* prompted many courts to conclude that a demonstration of the declarant's unavailability was a constitutional pre-condition to the admission of most hearsay statements. [Citation.] The validity of this interpretation of *Roberts*, however, is suspect in view of [*Inadi*]. * * * In the course of the opinion [in *Inadi*], the Court employed language that could be interpreted as repudiating the unavailability discussion in *Roberts*.

* * * Given its broadest construction, *Inadi* stands for the proposition that the unavailability of the declarant is a relevant constitutional factor only when the hearsay statements involve testimony given at a preliminary hearing. In my view, however, *Inadi* does not represent a repudiation of *Roberts'* unavailability discussion. Rather, I believe that *Inadi* merely reaffirms and applies the *Roberts* principle that a showing of unavailability is not required in all situations." *Nelson*, 874 F.2d at 1231 (Flaum, J., concurring).

We cite the foregoing language from Judge Flaum's concurring opinion because, with all due respect, we emphatically disagree. Our disagreement in part is due to the presence of a dissenting opinion in *Inadi* by Justice Marshall in which he vigorously condemns the majority opinion for limiting *Roberts* as we have now found it to be so limited. (*Inadi*, 475 U.S. at 400-11, 89 L. Ed. 2d at 402-09, 106 S. Ct. at 1129-34 (Marshall, J., dissenting).) We also find significant that Justice Blackmun, the author of *Roberts*, joined the majority opinion in *Inadi*, not the dissent of Justice Marshall.

Further, we have difficulty understanding the reasoning behind Judge Flaum's conclusion that *Inadi* did not repudiate the broad-based "unavailability" discussion of

Roberts. In our judgment, the Supreme Court, in the language we quoted from *Inadi*, *repeatedly* repudiates this *Roberts dicta*. Our question for those who think otherwise is this: If, in fact, the court *intended* to repudiate the *Roberts dicta*, what language could it have used to get the job done that was any stronger than the language actually employed?

We also disagree with *People v. Rocha* (1989), 191 Ill. App. 3d 529, 547 N.E.2d 1335, to the extent that decision holds the "unavailability" doctrine of *Roberts* to be still valid. In *Rocha*, the Second District Appellate Court had occasion to construe section 115-10 of the Code in its most recent version, as amended by Public Act 85-837, effective January 1, 1988 (1987 Ill. Laws 3471). (Ill. Rev. Stat. 1987, ch. 38, par. 115-10.) That statute provides that out-of-court statements of the alleged victim under the age of 13 in a prosecution for a sexual act may be admitted under certain circumstances. One of those circumstances is if the child either (1) testifies at the proceeding, or (2) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement. Ill. Rev. Stat. 1987, ch. 38, pars. 115-10(b)(2)(A), (b)(2)(B).

In *Rocha*, the Second District discussed not only this statutory requirement of unavailability, but also the issue of the witness' unavailability in view of the confrontation clause of the sixth amendment to the United States Constitution. In doing so, it spoke approvingly of the "unavailability" doctrine of *Roberts*, and it evaluated section 115-10 of the Code to determine whether that section met the criteria discussed in *Roberts*. The court concluded

that the statute did so. *Rocha*, 191 Ill. App. 3d at 541, 547 N.E.2d at 1343.

The Second District in *Rocha* cited *Inadi* as being a "recent Supreme Court decision which questions whether the *Ohio v. Roberts* analysis is even applicable outside of the factual setting of that case." (*Rocha*, 191 Ill. App. 3d at 541, 547 N.E.2d at 1343.) The *Rocha* decision is unclear regarding the continuing validity of the *Roberts dicta*, but, as before, we emphasize that we disagree with the holding in *Rocha* to the extent that it concludes *Roberts* has any application beyond the limited factual circumstances that case addressed.

In reaching its holding in *Rocha* with regard to *Roberts*, the Second District relied heavily on *People v. Bastien* (1989), 129 Ill. 2d 64, 541 N.E.2d 670, a case in which the Illinois Supreme Court held unconstitutional a statute authorizing the admissibility of the taped statement of the child-victim in a case involving charges of sexual abuse when the alleged victim was available at trial for cross-examination. We conclude this reliance was in error. In *Bastien*, the supreme court was dealing with a situation in which the prosecution, as in *Roberts*, was attempting to use a witness' *prior testimony* given by videotape in lieu of that witness being called upon to give her direct examination at trial. As we stated earlier, in these circumstances, *Roberts* still has validity, *but only in these circumstances*. In our judgment, the Second District in *Rocha* gave importance to *Roberts* beyond its factual context. *Bastien* lends no support to such an interpretation.

We also note that our position regarding *Roberts* and *Inadi* is consistent with the views expressed by the Third District Appellate Court in *People v. Unes* (1986), 143 Ill. App. 3d 716, 722-23, 493 N.E.2d 681, 685-86.

We agree with the views expressed on this subject in a recent decision of the Supreme Court of Washington in *State v. Palomo* (1989), 113 Wash. 2d 789, 783 P.2d 575. In *Palomo*, a police officer observed two persons struggling in a doorway. When he approached the scene, he observed a man kneeling on top of a woman. The woman was lying on her back. The man's pants were unbuttoned, unzipped, and fully opened in front. The woman's pants were undone and down around her knees. The man appeared to be pulling at the woman's pantyhose. He had one hand on the woman's waist and the other hand on her pantyhose. The woman was hitting and scratching the man and was screaming for help. The officer separated them and observed what appeared to be fresh scratches on the man's face. He arrested the man, who was the defendant, *Palomo*. As the officer did so, he testified that the woman was " 'crying, weeping, very upset.' " (*Palomo*, 113 Wash. 2d at ___, 783 P.2d at 576.) He further testified, " '[s]he said he was trying to rape me, get him away from me.' " *Palamo*, [sic] 113 Wash. 2d at ___, 783 P.2d at 576.

The defendant was charged with the attempt (rape) of E.S., but for some unexplained reason, E.S. did not testify. The prosecutor presented a case consisting entirely of the testimony of the arresting officer. Defense counsel objected to the admission of the statement as hearsay but the objection was overruled. The defendant did not testify.

After all of the evidence was presented, the defense argued for dismissal on the ground that the admission of the alleged victim's hearsay statement violated the defendant's right to confrontation under the United States Constitution and the Washington State Constitution because her unavailability had not been established. That argument was rejected, and defendant was convicted of attempt (rape) as charged.

On appeal of this conviction, the Washington Court of Appeals, in an unpublished opinion, held that the admission of the out-of-court hearsay statement without the showing of a good-faith effort to produce the witness violated defendant's right to confrontation.

On review of that decision, the Supreme Court of Washington noted that the trial court admitted the police officer's testimony, reciting the alleged victim's statement, under the "excited utterance" exception to the hearsay rule. The supreme court found the statement properly admitted under that recognized exception and noted that the court of appeals and defendant both relied on *Roberts* for the broad proposition that the confrontation clause bars admissibility of hearsay statements unless the unavailability of the out-of-court declarant is shown. The Washington Supreme Court then stated the following:

> "*Roberts* considered an Ohio statute that required a showing of unavailability for admission of *prior testimony*. In the present case, the statement of [E.S.] was admitted under the *excited utterance* exception to the hearsay rule which *does not require unavailability of the declarant*. [Citations.]

> Furthermore, *United States v. Inadi* [citation], limited the *Roberts* requirement of unavailability to cases involving prior testimony. [Citations.] *Ohio v. Roberts, supra, is not authority for requiring a showing of unavailability for admission of an excited utterance.* [Emphasis added.]
>
> * * *
>
> The 'excited utterance' exception to the hearsay rule applies even though the declarant is available as a witness. *A showing of unavailability is not required.* [Emphasis added.] [Citations.] The theory of this exception which vouches for its reliability is that the stress of the event suppresses the reflective faculties of the declarant with the result that the utterances are sincere and spontaneous. * * *
>
> * * * Although statements of co-conspirators are an *exemption* to the hearsay rule and excited utterances are an *exception* to the hearsay rule, *Inadi* noted that the same confrontation clause principles apply to both exemptions and exceptions." (Emphasis in original unless otherwise noted.) *Palomo*, 113 Wash. 2d at ___, 783 P.2d at 578-79.

The court concluded by noting that defendant was not denied his sixth amendment right to confrontation. "Under the excited utterance exception to the hearsay rule, [E.S.'s] out-of-court statement is admissible without a showing of her unavailability." *Palomo*, 113 Wash. 2d at ___, 783 P.2d at 579-80.

In *People v. Ingram* (1987), 162 Ill. App. 3d 257, 515 N.E.2d 1252, this court was presented with the same argument that is being made in the present case, *i.e.*, that before a spontaneous declaration can be received into evidence, the confrontation clause normally requires a

showing that the out-of-court declarant is unavailable. *Roberts* and *Inadi* were considered, and this court then rejected this argument, holding as follows:

> "In *United States v. Inadi* [citation], the court held the *Roberts* requirement of a showing of unavailability was inapplicable to the coconspiracy exception to the hearsay rule. The court noted that *Roberts*, which addressed the admissibility of prior testimony, should be limited to its facts. It does not stand for the proposition that no out-of-court statement is admissible absent a showing of unavailability.
>
> In Illinois prior to admission of an out-of-court statement under the spontaneous declaration exception to the hearsay rule, the statement must meet three criteria: (1) it must have resulted from an occurrence which is sufficiently startling that it was likely to produce a spontaneous and unreflecting statement; (2) it must have been made before there was time to fabricate the statement; and (3) it must have been related to the occurrence. *People v. Lewis* [citation]; *People v. McNeal* [citation]; *People v. Fields* [citation].
>
> Defendant argues that *Roberts* modified State law concepts by adding requirements of unavailability and reliability and spontaneous declarations from unknown declarants can never be admitted. He urges this court to overrule *McNeal* to the extent that it is inconsistent with *Roberts*. In *McNeal*, defendant was convicted of aggravated battery arising out of a fight which occurred in a tavern. A witness testified that he heard an unknown declarant advise the defendant not to do it immediately prior to defendant's shooting the victim. The court held the testimony was admissible regardless of the declarant's presence at trial because it met the criteria set forth for an excited utterance. [Citations.] * * *
>
> *Roberts* as interpreted by *Inadi* does not require a modification of *McNeal*." *Ingram*, 162 Ill. App. 3d at 260-61, 515 N.E.2d at 1254.

We reaffirm our holding in *Ingram*.

IV. SENTENCING ISSUES

Defendant was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint, and he was sentenced respectively to 10 years, 6 years, and 2 years in prison. Each of these sentences was ordered to run concurrently with the others. Aggravated criminal sexual assault is a Class X felony (Ill. Rev. Stat. 1987, ch. 38. par. 12-14(c)). meaning it is a non-probationable offense that carries a possible prison sentence of not less than 6 years nor more than 30 years (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1(a)(3)). Residential burglary is a Class 1 felony (Ill. Rev. Stat. 1987, ch. 38, par. 19-3(b)), meaning it carries a possible prison sentence of not less than 4 years and not more than 15 years (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1(a)(4)). Unlawful restraint is a Class 4 felony (Ill. Rev. Stat. 1987, ch. 38, par. 10-3(b)), meaning it carries a possible prison sentence of not less than one year nor more than three years (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1(a)(7)).

At the sentencing hearing, the court permitted a sheriff's investigator, over defense counsel's objection, to testify to a conversation the investigator had with a seven-year-old female. The child said defendant entered her bedroom while she was asleep, took off his pants and

underwear, removed the child's pajama bottoms and undies, and then hurt the child by lying on top of her. She told the investigator that she called for her mother who eventually entered the room and told the defendant to leave the residence. Citing *People v. La Pointe* (1981), 88 Ill. 2d 482, 431 N.E.2d 344, defendant argues that the admission of this hearsay evidence, in the absence of any corroboration, was error because the evidence was not reliable and improperly prejudiced him in the eyes of the sentencing court.

Upon review of defendant's record and the circumstances of the offenses he committed, we conclude we need not concern ourselves with whether the testimony of the sheriff's investigator was properly received in evidence at the sentencing hearing. See *People v. Mitchell* (1981), 98 Ill. App. 3d 398, 424 N.E.2d 658 (remand for resentencing not necessary where the record does not affirmatively demonstrate that the matter complained of was a factor in the sentence imposed).

At the time of the sentencing hearing in November 1988, defendant was 36 years old. In the six years prior to that date, he had been convicted of four separate felony offenses (burglary, two counts of aggravated battery, and felony criminal damage to property), as well as two Class A misdemeanors (theft and criminal damage to property). Defendant had been sentenced to multiple periods of probation and had received a three-year sentence to the Department of Corrections in December 1984. Despite this miserable record of criminality, defendant received only a 10-year sentence on the most serious of the offenses of which he was convicted, aggravated criminal sexual assault. We note that the sentence imposed is only

four years above the statutory minimum, and it is *20* years below the statutory maximum.

As to the defendant's specific criminal behavior in this case, the record shows that at 4 a.m., defendant surreptitiously entered the home of a former girlfriend (who he had reason to believe would not be home) and sexually assaulted a four-year-old child as she slept in her bed. A remand for resentencing on these facts with this defendant's criminal history is unnecessary because we can hardly imagine how a sentence of less than 10 years could be imposed. Accordingly, viewing any claimed error in the admission of evidence at the sentencing hearing in a light most favorable to the defendant, we hold any such error could not have been prejudicial.

For the reasons stated, the judgment and sentences imposed are affirmed.

Affirmed.

KNECHT, P.J., concurs.

McCULLOUGH, J., specially concurs.

JUSTICE McCULLOUGH, specially concurring:

The trial court should be affirmed.

I agree with the majority, the testimony of Grigsby and Lewis falls within the spontaneous declaration exception to the hearsay rule. Also, the testimony of Reents and Meinzen was admissible pursuant to section 115-13 (Ill. Rev. Stat. 1987, ch. 38, par. 115-13).

I do not agree with the necessity, relevance, or reasoning of the extended discussion of unavailability and

confrontation. *Inadi*, as the majority points out, involved the admissibility of a coconspirator's statements. This is not the case here. Once we determine the evidence is admissible under the spontaneous declaration exception to the hearsay rule, or proper under section 115-13, confrontation or availability is gone. As stated in the Handbook of Illinois Evidence: "Exceptions to the general rule excluding hearsay other than admissions * * * are separated into two categories: those exceptions that are not affected by the availability or unavailability of the declarant, §803 infra, and those exceptions that require that the declarant be unavailable before the hearsay statement may be admitted, §804 infra." M. Graham, Cleary & Graham's Handbook of Illinois Evidence §803.1, at 545 (4th ed. 1984).

Two statements, Grigsby and Lewis, are spontaneous declarations. This hearsay exception is " 'firmly * * * rooted in our jurisprudence.' " (*Coy v. Iowa* (1988), 487 U.S. ___, ___, 101 L. Ed. 2d 857, 867, 108 S. Ct. 2798, 2803, quoting *Bourjaily v. United States* (1987), 483 U.S. 171, 183, 97 L. Ed. 2d 144, 157, 107 S. Ct. 2775, 2783.) Availability or confrontation is not a needed element or criterion. *Ingram*, 162 Ill. App. 3d 257, 515 N.E.2d 1252.

The admissibility of the statements made to Reents and Meinzen was proper under section 115-13. Likewise, availability and confrontation are neither elements nor required for admissibility. The statements were made for proper diagnosis or treatment, and met the requirements of the statute, as well as the long-standing rule.

Roberts involved a different factual setting concerning availability: preliminary hearing testimony used at

trial. Here, the statement from *Roberts* (488 U.S. at 66, 65 L. Ed. 2d at 608, 100 S. Ct. at 2539). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," confirmed in *Coy*, determines the issue.

The statement by the majority, "that we be clear and emphatic in our holding on this point: Whether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule" (slip op. at 31), is correct as to the issues in this case, spontaneous declaration and medical history, section 115-13. It is not a correct statement as to all hearsay.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

October 3, 1990

State Appellate Defender Springfield
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No. 70413 – People State of Illinois, respondent, v. Randall D. White, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.

Supreme Court of the United States

No. 90-6113

Randall D. White,

Petitioner

v.

Illinois

ON PETITION FOR WRIT OF CERTIORARI to the Appellate Court of Illinois, Fourth District.

ON CONSIDERATION of motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 29, 1991

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

No. 90-6113

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RANDALL D. WHITE,
Petitioner,

v.

ILLINOIS,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fourth Judicial District

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause requires that the hearsay statements of a non-testifying complaining witness in a sexual abuse prosecution should be admitted against the accused only upon a case-specific finding of necessity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-6113

RANDALL D. WHITE,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fourth Judicial District

---

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

Certiorari was granted to review the decision of the Illinois Appellate Court, Fourth Judicial District in *People v. White*, 198 Ill. App. 3d 641, 555 N.E.2d 1241 (4th Dist. 1990), reprinted at pages 19-55 of the Joint Appendix. The order of the Illinois Supreme Court denying leave to appeal is reprinted at page 56 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF THE CASE

A. Introduction

The defendant was charged with the aggravated criminal sexual assault of S.G., as well as the related offenses of unlawful restraint and residential burglary.[1] The five-year-old complaining witness did not testify at trial. Instead, the prosecutor was allowed to introduce S.G.'s out-of-court declarations through the testimony of hearsay witnesses.

Following the admission of the hearsay testimony, S.G. was brought to the courtroom for the purpose of testifying, but did not take the stand. (J.A. 10-12) Defense counsel noted for the record that:

> [L]ate yesterday afternoon the alleged victim in this case [S.G.] was presented to the jury in the arms of a man who, ostensibly [sic] the father of the child. She did not testify allegedly because of emotional hiatus of some sort.
>
> (J.A. 14)

Defense counsel moved for a mistrial, arguing that S.G.'s "presence, failure to testify, and exhibition" before the jury denied the defendant a fair trial. (J.A. 14)

---

[1] The residential burglary charge alleged the illegal entry into a dwelling "with the intent to commit therein the offense of unlawful restraint" in violation of Ill.Rev.Stat., 1987, Ch. 38, § 19-3(a).

The motion was denied (J.A. 15), and the jury subsequently found the defendant guilty of the offenses charged. (Vol. VII, R. 65)

On appeal, the defendant contended that he was denied his Sixth Amendment right to confront his accuser where the prosecution relied upon hearsay testimony and neither produced the declarant for cross-examination nor established that she was unavailable to testify. In rejecting the defendant's claim, the Illinois Appellate Court held that the question of unavailability "is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule." (J.A. 42)

B. The Hearsay Testimony

S.G.'s out-of-court declarations were related by her mother and four other witnesses. Tammy Grigsby is S.G.'s mother. (Vol. VI, R. 64) Grigsby and the defendant had dated on many occasions between September, 1987 and April, 1988. (Vol. VI, R. 66, 88-91) The defendant was often a guest at the Grigsby residence. (Vol. VI, R. 88) According to Grigsby, they broke off their relationship around the first of April, 1988, because the defendant told her "that he wanted to start seeing other people, so we did." (Vol. VI, R. 89) They subsequently went out together on April 12, 1988. (Vol. VI, R. 90)

Three nights later on April 15, 1988, fourteen-year-old Tony DeVore was babysitting for S.G. and S.G.'s three-year-old brother Eric at the Grigsby residence. (Vol. VI, R. 8) After putting the children to bed in their mother's bedroom, DeVore fell asleep on the livingroom couch. (Vol. VI, R. 9-10) Devore was subsequently awakened by a scream at four in the morning. (Vol. VI, R. 10, 26) She proceeded upstairs and observed the defendant exiting the bedroom. (Vol. VI, R. 11) The defendant informed

her that S.G. "woke up screaming." (Vol. VI, R. 11-12) The defendant then left the residence. (Vol. VI, R.12)

DeVore knew the defendant because "at one time" he had been a friend of S.G.'s mother. (Vol. VI, R. 27) DeVore continued her testimony by stating that she asked S.G. what happened, and S.G. told her. (Vol. VI, R. 12) Defense counsel interposed a hearsay objection. (Vol. VI, R. 13) The court overruled the objection on the ground that S.G.'s out-of-court statements were admissible under spontaneous declaration exception to the hearsay rule. (Vol. VI, R. 15)

DeVore continued her testimony as follows:

> Q. Okay, what did [S.G.] say at that point?
>
> A. When I went in there she said he put his hand over her mouth. He had been choking her. And she told me that he was touching her in the wrong places and he also said that if she screamed then he would whip her and then call me up there to whip her.
>
> Q. Okay. Now, as best you recall, what did [S.G.] say he or did she identify the person or what?
>
> A. She said—well, first she said his name, Randy.
>
> Q. Okay.
>
> A. And then she went on with he.
>
> Q. Okay. Start with Randy?
>
> A. Yeah.
>
> Q. Okay. Now, you said—you testified that she said he toucher her in wrong places. How did she phrase that as best you recall?
>
> A. She said—she said, "He was touching me." And when I asked where she point[ed] to her private places.
>
> Q. Okay. And [I] ask you could you prescribe where she pointed?
>
> A. To the lower part of her body.

> Q. Okay. And—
>
> [The defendant's continuing hearsay objection was overruled.]
>
> Q. Do you know the name for the portion of the anatomy for what you talked about?
>
> A. Yes, I do.
>
> Q. What was she pointing to?
>
> A. The vaginal area.
>
> (Vol. VI, R. 12-17)

DeVore testified that after she consoled S.G., "she finally calmed down and she quit crying a little bit." (Vol. VI, R. 17)

Tammy Grigsby arrived home about 30 minutes later. (Vol. VI, R. 17-19, 28) At that time, S.G. "wasn't crying or anything" (Vol. VI, R. 77), but appeared "scared" and a "little hyper." (Vol. VI, R. 77-78) Grigsby explained:

> Q. How did she appear emotionally and physically?
>
> A. She was worried that I was going to be mad at her.
>
> (Vol. VI, R. 78)

Grigsby further testified that she told S.G., "Honey you got to tell me what happened." (Vol. VI, R. 77) Grigsby continued her testimony, over defense objection, as follows:

> A. She said she woke up and that Randy was in the room. And that he had put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony would whip her too. And then she said that he put his mouth on her front part.
>
> (Vol. VI, R. 79)

Grigsby stated that she examined S.G. and noticed some "bruises or red marks" on her neck. (Vol. VI, R. 81) Grigsby also noticed that S.G.'s "front part" was "a little red." (Vol. VI, R. 81)

Officer Terry Lewis arrived at 4:47 a.m. (Vol. VI, R. 107) Officer Lewis described S.G.'s condition as follows:

> Q. Could you describe [S.G.'s] appearance emotionally, physically when you were talking to her in the kitchen?
>
> A. At first she was very cooperative. Talkative. Somewhat timid.
>
> Q. Uh-huh. Did she appear upset at that time?
>
> A. Yes, she did.
>
> Q. Could you describe in what way what made you believe she was upset?
>
> A. Just kind of nervous. She was willing to talk to me, but she has some reservations and that type of thing.
>
> Q. Was she using words like reservations or like that?
>
> A. No, no, she was just—to me you know as she was just uneasy, but after talking, you know, getting her at ease. We talked about unrelated things at which got her at ease. We discussed different cartoons that we had in common.
>
> Q. Okay.
>
> A. Things like that and she was like—after that she was very talkative very cooperative.
>
> (Vol. VI, R. 109-10)

After putting S.G. at ease, Officer Lewis questioned her regarding the incident. (Vol. VI, R. 110) Officer Lewis continued his testimony, over defense objection, as follows:

> Q. What if anything did she tell you after you got past talking about the cartoons?
>
> A. She then told me that she had been asleep in her mom's bed with her brother. And that she woke up. She was awakened. And she started screaming. And she was scared. And she said there was a man there that she identified as Randy.
>
> Q. What did—what did she say happened then if she said anything?
>
> A. Well then I asked her what happened. And she told me that Randy had woke her up and it scared her and she started screaming and that he had put his hand on her mouth and she described it as choking her, which I did see some marks on her face.
>
> Q. Back to that in a minute. Could you go on with what she said then?
>
> A. Okay. Okay. Then she said that Randy told her to keep quiet, because if she didn't he was going to whip her. And that he would also tell the babysitter and have Tony whip her also.
>
> Q. Okay. What did she say if anything happened then?
>
> A. She went on and she started talking about her pants being wet.
>
> Q. Okay.
>
> A. And when I referred to them as pants, she advised me they were not pants they were underwear. And that they were wet. I asked if she had peed in her pants and she got disgusted with me she said, "I don't pee in my pants, my underwear" she said.
>
> Q. Uh-huh.
>
> A. And she said Randy done it. So I asked her then I said how did Randy make them wet. And she told me that he had pulled her pants to one side and

used his tongue on her private parts, what she called her private parts.

(Vol. VI, R. 110-12)

Officer Lewis further testified that he noticed some scratches on S.G.'s neck. (Vol. VI, R. 112-13) S.G. advised him that the scratches had been inflicted by the defendant. (Vol. VI, R. 113)

Cheryl Reents, an emergency room nurse, testified that she interviewed S.G. at 8:00 a.m. Ms. Reents described S.G.'s condition as follows:

Q. Okay. And could you describe her emotional or physical condition as best you recall it when you were talking to her in room nine alone?

A. She was cooperative. She put her eyes down at first and seemed—she was twisting her ID band around her wrist. I remember that she was looking down and after that she did answer for me.

(Vol. VII, R. 9-10)

Nurse Reents testified that she then asked S.G. "what happened" and she "just kept asking her what happened then, what happened." (Vol. VII, R. 10) In response to defense counsel's hearsay objection, the prosecutor argued the testimony was admissible as both a spontaneous declaration and "as a statement made for medical purposes to be turned over to the physician for treatment diagnosis." (Vol. VII, R. 10) The objection was overruled and Nurse Reents was allowed to continue her testimony as follows:

A. Okay. As I stated, patient was asked by myself what happened. And she said she was sleeping. And I asked how she was awakened.

Q. Uh-huh.

A. And she said Randy came in. Then I asked her what happened then. That's when she looked down and was turning the I.D. band around on her wrist.

Q. Okay.

A. And let's see [S.G.] said, "He put his hand on my mouth and on my neck."

Q. Okay. What did you do at that point?

A. Okay. Then I asked if he touched her anywhere else. And she said yes. And I asked her where. And she said, "Oh my front part." And then for clarification I asked her to point where. And the patient pointed to the mons area.

Q. Okay. And that's what?

A. That's the genital, the labia majora and the surrounding tissue in the genital area.

Q. On the female?

A. Yes, on the female. Okay. And I—then I, for more clarification, I asked her what he touched her with. And she stated his mouth. And then I asked her if he touched her with anything else. She said no. Then I asked her if he touched her with his front part and she stated no. I asked her if he touched her back—herback part. And she said no. And then I asked her if he made her touch him. She said no. Then I asked her if he made her put her mouth anywhere. She said no. And then I asked if anything was put inside of her. She said no. And I asked if it had ever happened before and she said yes when it was cold out.

Q. Okay.

A. And then she continued to say that he put his mouth on her, but he didn't hurt her that time.

(Vol. VII, R. 10-12)

Dr. Michael Meinzen examined S.G. about twenty minutes later when she was "calm and comfortable." (Vol. VI, R. 47) Dr. Meinzen continued his testimony, over defense objection, as follows:

A. What did she tell me, okay. She—after what she'd—she said she was sleeping. And then what

happened. And she said that I believe at first she just said he touched me or he was on me. And we asked who. She mentioned the name Randy. And at that point, you know, we asked her to direct attention to what—where was it that she touched. She said he put his hands over her mouth and on her neck. And asked what else happened. And she said that he put his mouth down there. We tried to get to be more specific. And asked her to point and touch where exactly he had placed his mouth. And she pointed in the—in the area of her external genitalia.

Q. All right.

A. At that point asked her was she hurt anywhere. And she didn't state that she was in any pain at that particular time. She was rubbing an area on her neck that initially then we directed her attention elsewhere and she didn't seem to be holding that area too much more. Specific questions then that we asked was she hurting anywhere in her genital area. And breaking it down you know into children's terms pointing and asking her specifically where she pee-pee and where she pointed was she hurting anywhere there. And she said no that she wasn't. We asked had anything put in there. Had he put any finger in or any other things. She said that nothing had been pushed into her. And we encouraged her to identify her anatomy a little bit more so we knew what we were talking about.

Q. Okay.

A. Then asked her a lot of these questions were asked very slowly to make sure that she understood what we were talking about. And, you know, case was such she just said that only that he placed his mouth over her external genitalia and just pointed in that general region. We asked whether she had had to touch him anywhere. Whether she had to place her mouth or anything on any of his parts. And she said that she had not.

(Vol. VI, R. 49-51)

C. The Subsequent Trial Proceedings

Following the prosecutor's decision not to call S.G. as a witness, the defense moved for a mistrial. (J.A. 14) The motion was denied. (J.A. 15)

The prosecution rested. (Vol. VII, R. 17)

Defense counsel moved for a directed verdict, stating:

> There is an utter lack of any physical evidence of sexual abuse case [sic].
>
> It is incumbent that the proof be corroborated or be clear and convincing. Here of course we've have [sic] no testimony whatsoever of the alleged victim in this cause. We have had a number of other people testify as to what she supposedly told them. However, again it's been uncorroborated.
>
> (J.A. 16)

The motion was denied. (J.A. 17)

The jury found the petitioner guilty of the offenses charged. (Vol. VII, R. 65)

The defendant filed for a new trial, alleging in pertinent part, as follows:

> The court erred in admitting the following evidence offered by the State over objections by the defendant:
>
> (a) Testimony by the witness Tony DeVore as to matters allegedly stated to her by the purported victim.
>
> (b) Testimony of witness Dr. Michael Meinzen as to matter allegedly stated to him by the purported victim.
>
> (c) Testimony by the witness Tammy Grigsby as to statements allegedly made to her by the purported victim in this cause.
>
> (d) Testimony of witness Officer Terry Lewis as to statements made to him by the alleged victim in this cause.

(e) Testimony by witness Cheryl Reents as to statements allegedly made to her by the purported victim in this cause.

* * * *

That it was error for the Court to deny Defendant's motion for mistrial.

(C. 64-65)

The motion was denied. (C. 4)

The defendant was sentenced to terms of ten years imprisonment for aggravated criminal sexual assault, six years imprisonment for residential burglary, and two years imprisonment for unlawful restraint. (C. 115) The sentences were ordered to run concurrently. (C. 116)

SUMMARY OF ARGUMENT

The defendant's convictions were premised upon the out-of-court declarations of a child. Although the five-year-old complaining witness was present in the courtroom, she did not testify and there was no showing that she was unavailable. In upholding the defendant's convictions over a Confrontation Clause challenge, the Illinois Appellate Court held that the question of "[w]hether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement is admissible under an exception or exemption to the hearsay rule." (J.A. 42)

The Illinois Appellate Court's ruling unnecessarily and and impermissibly dispenses with the defendant's Sixth Amendment right to confront his accuser. In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the Court set forth the general rule that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." The unavailability doctrine reflects a "rule of necessity." *Ohio v. Roberts*, 448 U.S. at 65. It recognizes that the right of confrontation is not absolute, yet

expresses a preference that the criminal defendant be given an opportunity to confront his accuser, if at all possible.

This Court has applied the *Roberts* approach to procedures that shield child witnesses from face-to-face confrontation at trial. *See Coy v. Iowa*, 487 U.S. 1012 (1988) (partition placed between child witness and defendant); *Maryland v. Craig*, 497 U.S. ——, 111 L. Ed. 2d 666 (1990) (child witness permitted to testify via closed-circuit television). In *Coy*, 487 U.S. at 1021, the Court suggested that any infringement upon the right of confrontation would be allowed "only where necessary to further an important public policy." Thereafter, in *Craig*, 111 L. Ed. 2d at 686, the Court held that such a procedure should be employed only "where necessary to further the importnat state interest in preventing trauma to child witnesses in child abuse cases." Accordingly, the prosecution must make "an adequate showing of necessity" and the trial court must find the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Maryland v. Craig*, 111 L. Ed. 2d at 685,

Like the procedures employed in *Coy* and *Craig*, the use of hearsay testimony shields the child witness from the trauma of testifying. In fact, the prejudice to the defendant's confrontation right is much more severe where the prosecution relies solely upon hearsay testimony since the declarant is never required to submit to cross-examination. Since the rule of necessity is applicable to procedures that merely infringe upon the confrontation right, it should certainly apply to a procedure that dispenses with the confrontation right altogether.

Therefore, the defendant's right to confront his accuser in child abuse cases should be dispensed with only where necessary to further the state's importnat interest in the physical and psychological well-being of the child witness. Prior to resorting to the use of hearsay testimony

as a means of shielding the child witness from confrontation, the prosecution must make an adequate showing of necessity and the court must find that the witness is unavailable to testify. If that finding is made, appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. Since the exclusive reliance upon hearsay testimony abrogates the confrontation right entirely, the trial court must explore alternative, less restrictive means of impinging on the defendant's confrontation right. For example, if a child will not suffer severe emotional trauma when testifying via closed-circuit television, that procedure should be followed.

In this case, the prosecution did not make a showing of necessity and the trial court did not find that the child witness was unavailable to testify. Under these circumstances, the prosecution's reliance upon hearsay testimony violated the defendant's Sixth Amendment right to confront his accuser.

ARGUMENT

THE CONFRONTATION CLAUSE REQUIRES THAT THE HEARSAY STATEMENTS OF A NON-TESTIFYING COMPLAINING WITNESS IN A SEXUAL ABUSE PROSECUTION SHOULD BE ADMITTED AGAINST THE ACCUSED ONLY UPON A CASE-SPECIFIC FINDING OF NECESSITY: THE TRIAL COURT SHOULD HEAR EVIDENCE AND DETERMINE IF THE CHILD IS UNAVAILABLE TO TESTIFY.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that a criminal defendant has the right "to be confronted with the witnesses against him." U.S. CONST., amends. VI, XIV; *Pointer v. Texas*, 380 U.S. 400 (1965). This provision conflicts with the admission of hearsay testimony against a criminal defendant

at trial because the defense lacks the opportunity to confront and cross-examine the absent declarant. In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court considered the competing interests of a criminal defendant's right to confront his accuser and the prosecutorial need for admitting relevant evidence through the use of hearsay exceptions. Summarizing a near-century of jurisprudence, reflected by Supreme Court cases decided over the years, the Court stated that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." *Ohio v. Roberts*, 448 U.S. at 66.

The *Roberts* unavailability doctrine reflects a "rule of necessity." *Ohio v. Roberts*, 448 U.S. at 65. It recognizes that the right of confrontation is not absolute, yet expresses a preference that the criminal defendant be given an opportunity to confront his accuser, if at all possible.

The defendant's convictions in this case were premised upon the out-of-court declarations of a non-testifying complaining witness. On appeal, the defendant contended that he had been denied his Sixth Amendment right to confront his accuser since the unavailability requirement of *Roberts* had not been satisfied. In rejecting the defendant's contention, the Illinois Appellate Court dismissed the *Roberts* approach as "the 'Sistine Chapel' of *obiter dicta*" and concluded that:

> Whether an out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement is admissible under an exception or exemption to the hearsay rule.[2]
>
> (J.A. 42)

[2] The Illinois Appellate Court noted that "[t]he only exception to this holding is the factual situation present in *Roberts*, *i.e.*, the use at trial of the previous testimony of a witness who is not longer available." (J.A. 42)

The Illinois Appellate Court's ruling violates the Sixth Amendment by effectively reducing the Confrontation Clause to a rule of evidence. The recent decisions of this Court have reiterated the rule that a defendant's right to confront his accuser may be dispensed with only where "necessary to further an important state interest." *Maryland v. Craig*, 497 U.S. ——, 111 L. Ed. 2d 666, 682 (1990). The application of the necessity doctrine to child abuse cases properly balances the state's legitimate interest in protecting the welfare of the child with the defendant's constitutional right to confront his accuser. Since the defendant's constitutional right to confront his accuser should only be dispensed with where necessary to further the state's legitimate interest in the welfare of the child witness, it is clear that the Illinois Appellate Court's decision fails to pass constitutional muster.

A. The Illinois Appellate Court Erred By Equating The Confrontation Clause With The Rule Against Hearsay.

If, as the Illinois Appellate Court held, the unavailability of the declarant is completely irrelevant to the admission of hearsay testimony, the requirements of the Confrontation Clause would be satisfied whenever the out-of-court statement falls within an exception to the hearsay rule.[3] Thus, the Illinois Appellate Court's decision essentially equates the Confrontation Clause guarantee with the hearsay rule. However, the hearsay exceptions are merely rules of evidence; they do not mark the boundary of the Confrontation Clause. This Court has cautioned that while "hearsay rules and the Confrontation Clause are designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules against hearsay." *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (citations and footnotes omitted).

[3] The Illinois Appellate Court did not make any distinction between statutory hearsay exceptions and firmly rooted common law exceptions to the hearsay rule, nor did the Appellate Court require that the hearsay statements possess any particular indicia of reliability. In fact, the Appellate Court upheld the admission of a number of hearsay statements pursuant to a "liberal" interpretation of an Illinois statute exempting statements made to medical personnel from the hearsay rule. (J.A. 35-39) The Illinois Appellate Court's holding is, therefore, in direct conflict with this Court's recent decision in *Idaho v. Wright*, 497 U.S. ——, 111 L.Ed.2d 638, 654 (1990) (holding that hearsay statements made to a physician, admitted pursuant to a statutory exception to the hearsay rule, violated the Confrontation Clause since the exception was not "firmly rooted" and the prosecution failed to establish that the statements possessed sufficient "particularized guarantees of trustworthiness").

In contrast to the rule against hearsay, the right of confrontation is "basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). "It includes both the right to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. at 725. The Confrontation Clause thus assures the accused the right to the adversarial testing of the prosecution's evidence. As this Court recently stated:

> The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.
>
> *Maryland v. Craig*, 111 L.Ed.2d at 678.

This means of testing accuracy is so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. 274, 295 (1973), quoting *Berger v. California*, 393 U.S. 314, 315 (1969).

The Illinois Appellate Court's ruling needlessly dispenses with adversarial testing and allows the prosecution to build a case consisting entirely of hearsay testimony while shielding the complaining witness from cross-examination. Such a procedure permits the prosecution

to "subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said." *Maryland v. Craig*, 111 L. Ed. 2d at 691 (Scalia, J., dissenting). As Wigmore has noted:

> A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author . . .
>
> 5 Wigmore, Evidence, § 1364 at p. 6, n. 3 (Chadbourn rev. 1974), quoting *Coleman v. Southwick*, 9 John. 50 (N.Y. 1812).

1. United States v. Inadi *Is An Exception To, Rather Than A Repudiation Of, The Unavailability Doctrine Of* Roberts.

The Illinois Appellate Court's ruling was premised upon an interpretation of *United States v. Inadi*, 475 U.S. 387 (1986). The precise holding of *Inadi* was that no unavailability showing is required when statements are admitted pursuant to the co-conspirator exception to the hearsay rule, *i.e.*, co-conspirator statements made during the course and in furtherance of the conspiracy. In so holding, the Court stated:

> *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the Government without a showing that the declarant is unavailable.
>
> *Inadi*, at 393-94.

Emphasizing the language quoted above, the Illinois Appellate Court concluded that the *Inadi* decision "repudiated" the unavailability doctrine of *Roberts*.

It is difficult to reconcile the Illinois Appellate Court's conclusion with the language of *Roberts*.[4] In *Roberts*, the Court set forth a "general approach" that "normally requires a showing of unavailability," but also recognized that competing interests such as "public policy and the necessities of the case" may warrant dispensing with confrontation at trial. Consequently, it is apparent that *Inadi* is not necessarily inconsistent with the general rule of unavailability enunciated in *Roberts*. *See Maryland v. Craig*, 111 L. Ed. 2d at 691 (Scalia, J., dissenting) (describing *Inadi* as an "exception to the general rule of unavailability"); *Nelson v. Farrey*, 874 F.2d 1222, 1231 (7th Cir. 1989) (Flaum, J., concurring) (. . . "*Inadi* merely reaffirms and applies the principle that a showing of unavailability is not required in all situations.").

In fact, less than two weeks after the release of the Illinois Appellate Court's decision in this case, the *Roberts* approach was reiterated in *Idaho v. Wright*, 497 U.S. ——, 111 L. Ed. 2d 638 (1990). The Court stated:

> In *Ohio v. Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay."

---

[4] The Illinois Appellate Court retreated somewhat from its "clear and emphatic" renunciation of the *Roberts* doctrine (J.A. 42), following this Court's subsequent decision in *Idaho v. Wright*, 497 U.S. ——, 111 L.Ed.2d 638 (1990) (applying the "*Roberts* approach" to the admission of hearsay testimony from a non-testifying child declarant in a sexual abuse case). *See People v. Coleman*, 205 Ill.App.3d 567, 563 N.E.2d 1010, 1020 (4th Dist. 1990) (finding it unnecessary to decide "[to] what extent the *Wright* opinion, by its strong reliance on *Roberts* and the analysis contained therein, reinvigorates the requirement that the witness is unavailable . . .").

"First, in conformance with the Framers' preference for face-to-face accusations, the Sixth Amendment establishes a rule of necessity. In the usual case . . ., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."

Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Idaho v. Wright, 111 L.Ed.2d at 651-52, quoting *Ohio v. Roberts*, 448 U.S. at 65-66.[5]

2. *The Rationale That Prompted This Court To Except The Admission Of Co-Conspirator Statements From The General Rule Of Unavailability Is Not Applicable To The Out-Of-Court Statements Of Complaining Witnesses.*

In concluding that the unavailability requirement is not applicable to the statements of co-conspirators, the *Inadi* Court focused on the special relationship between conspirators. Noting that the relationship between co-conspirators will have changed substantially between the time it was formed and the time of trial, the Court stated:

> Conspirators are likely to speak differently when talking to each other in furtherance of their own illegal aims than when testifying on the witness stand.
>
> *United States v. Inadi*, 475 U.S. at 395.

[5] Since the trial court in *Wright* found that the child witness was incapable of communicating with the jury, the case did "not raise the question of whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial and, if so, what that showing requires." *Idaho v. Wright*, 111 L.Ed.2d at 652.

Since the declarant and the defendant will have changed from partners in crime to suspects in a criminal prosecution, the declarant "has little incentive to aid the prosecution" and will have a motive for testifying falsely about the statements in view of the specter of imminent indictment. *United States v. Inadi*, 475 U.S. at 395.

The relationship between the accused and his accuser, however, is entirely different from the relationship between co-conspirators. Unlike co-conspirators, who are partners in crime, the complaining witness and the defendant are involved in a continuing adversarial relationship. Unlike co-conspirators, who may be difficult to locate, the complaining witness is uniquely accessible to the prosecution. Unlike a co-conspirator, who is not necessarily an adverse witness, the complaining witness is the defendant's primary accuser.

Significantly, the particular vice that gave rise to the Confrontation Clause was the practice of trying defendants on "evidence" consisting solely of *ex parte* affidavits or depositions secured by examining magistrates, thus denying the defendant an opportunity to cross-examine his accuser, under oath, and before the trier of fact. *California v. Green*, 399 U.S. 149, 156 (1970). Since the Confrontation Clause was intended to prevent trials by anonymous accusers and absentee witnesses (*California v. Green*, 399 U.S. at 179), it is apparent that the Framers contemplated that an available complaining witness would be called to the stand and examined by the prosecution in open court, and that the witness would be cross-examined by the defense. As this Court stated in *Lee v. Illinois*, 476 U.S. 530, 540 (1986):

> [T]he Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial.

B. The Necessity Doctrine Is Applicable To The Admission Of Hearsay Statements From A Non-Testifying Complaining Witness In Child Abuse Prosecutions.

The "rule of necessity" enunciated in *Roberts* reflects the Confrontation Clause preference that an accused be given an opportunity to confront his accuser, if at all possible. *Roberts*, 448 N.E.2d at 65. Recently, this Court applied the necessity doctrine to certain procedures that shield child witnesses from face-to-face confrontation in sexual abuse cases. The Court held that such an infringement upon the defendant's confrontation right may be allowed only where the "procedure is necessary to protect the welfare of the particular witness who seeks to testify." *Craig* at 685.

The necessity doctrine should also apply to the use of hearsay testimony for the purpose of shielding a child complaining witness from testifying. The use of hearsay testimony not only infringes upon the defendant's confrontation right, it abrogates the right entirely by dispensing with cross-examination. The application of the rule of necessity under these circumstances would tend to preserve the adversary nature of the trial, while promoting the state's interest in the well-being of the child.

1. Coy v. Iowa *and* Maryland v. Craig *Establish That Any Significant Impairment Of The Defendant's Right To Confront His Accuser In Child Abuse Prosecutions Will Be Allowed Only Where The Denial Of Such Confrontation Is Necessary To Protect The Welfare Of The Child.*

In *Coy v. Iowa*, 487 U.S. 1012 (1988), this Court held that the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial violated the defendant's Sixth Amendment right to confront his accusers. The Court struck down the procedure because it lacked the "core" confrontation right of an accused to physically face the witnesses against him. *Coy v. Iowa* 487 U.S. at 1017. Citing *Ohio v. Roberts*, this Court suggested that

any exception to the right would be allowed only where "necessary to further an important public policy." *Coy v. Iowa*, 487 U.S. at 1021.

Coy was followed by *Maryland v. Craig*, 497 U.S. ——, 111 L.Ed.2d 666 (1990), wherein this Court reviewed a procedure that permitted the use of closed-circuit television for the receipt of testimony by a child witness in child abuse cases. The Court recognized that "a state's interest in the physical and psychological well-being of child may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 111 L.Ed.2d at 685.

The Court cautioned, however, that such a procedure should be employed only "where necessary to further the important state interest in preventing trauma to child witnesses in child abuse cases." *Maryland v. Craig*, 111 L.Ed.2d at 686. Accordingly, the prosecution must make "an adequate showing of necessity" and the trial court must find that: (1) the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify;" (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," and (3) "the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify." *Maryland v. Craig*, 111 L.Ed.2d at 685 (citation omitted).

2. *The Application Of The Necessity Doctrine To The Admission Of The Hearsay Statements Of Non-Testifying Complaining Witnesses In Child Abuse Cases Properly Balances The State's Legitimate Interest In Protecting The Welfare Of The Child Witness With The Defendant's Constitutional Right To Confront His Accuser.*

Like the procedures employed in *Coy* and *Craig*, the use of hearsay testimony shields the child witness from the trauma of testifying. However, unlike the procedures in

Coy and *Craig*, which merely infringe upon the defendant's confrontation right by dispensing with face-to-face presence, the reliance upon hearsay testimony completely abrogates the confrontation right by dispensing with cross-examination as well.

It is clear, therefore, that the prejudice to the defendant's confrontation right is much more severe where the prosecution relies solely upon hearsay testimony as opposed to closed-circuit television. Although face-to-face presence is a "core" component of the Confrontation Clause, it is not the "sine qua non of the confrontation right." *Maryland v. Craig*, 111 L.Ed.2d at 679. "The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*" *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974), quoting 5 Wigmore, Evidence, § 1395, p. 123 (3d ed. 1940). (Emphasis in original).

The Confrontation Clause also ensures that a witness will give his statements under oath and permits the jury to observe the demeanor of the witness in making his statements. In applying the necessity doctrine to the admission of closed-circuit testimony in *Craig*, this Court noted that although the procedure denies a defendant face-to-face confrontation, "the presence of [the] other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Maryland v. Craig*, 111 L.Ed.2d at 682, quoting *Coy v. Iowa*, 487 U.S. at 1020.

Since the rule of necessity is applicable to the admission of a child's testimony via closed-circuit television, it should also apply to the use of hearsay testimony. While closed-circuit television infringes on the defendant's confrontation right by excusing face-to-face presence, the use of hearsay testimony dispenses with the right of confrontation entirely: the complaining witness never testifies under oath; the jury does not have the opportunity to observe her demeanor while making the statements; and, most significantly, the defendant is never given an opportunity to cross-examine his accuser.

Therefore, the defendant's right to confront his accuser in child abuse cases should be dispensed with only where necessary to further the state's important interest in the physical and psychological well-being of the child witness. The prosecution must make an adequate showing of necessity and the court must find that the witness is unavailable to testify. If that finding is made, appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. Since the exclusive reliance upon hearsay testimony abrogates the confrontation right entirely, the trial court must explore alternative, less restrictive means of impinging on the defendant's confrontation right. For example, if a child will not suffer severe emotional trauma when testifying via closed-circuit television, that procedure should be followed.[6]

C. The Application Of The Rule Of Necessity To This Case Requires That The Defendant Be Granted A New Trial.

At the defendant's jury trial, the prosecution introduced the complainant's out-of-court declarations through the testimony of five witnesses: babysitter, mother, police officer, doctor and nurse. This hearsay testimony was admitted over defense objection. The hearsay testimony of the first three witnesses was admitted under the spontaneous declaration exception to the hearsay rule.[7] The

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[6] Section 106A-3 of the Illinois Code of Criminal Procedure authorizes the closed-circuit viewing of a child's testimony. Ill.Rev. Stat., 1987, Ch. 38, § 106A-3.

[7] The prosecution apparently elected to proceed under the common law exception rather than the statutory hearsay exception applicable

testimony of the latter two witnesses was introduced pursuant to an Illinois statute that permits the admission of statements made to medical personnel as an exception to the hearsay rule. *See* Ill.Rev.Stat., 1987, Ch. 38, § 115-13.

Following the admission of the hearsay testimony from these five witnesses, the prosecution called the complaining witness. The complainant did not take the stand. After subsequently indicating that he would attempt to recall the complainant, the prosecutor decided not to put her on the stand.

In moving for a mistrial, defense counsel noted for the record that the complaining witness did not testify "allegedly because of emotional hiatus of some sort." (J.A. 14) Defense counsel argued, in part, that the complainant's "failure to testify" was "prejudicial and operated to deprive [the defendant] of a fair trial." (J.A. 14) The motion was denied.

It is possible under the facts of this case that the prosecutor determined that the complainant did not want to testify or that she was unable to testify due to her emotional condition. However, a witness should not be declared "unavailable" simply because a prosecutor concludes that the witness might not want to testify. The prosecution must make an adequate showing of necessity and the court must find that the witness is in fact unavailable. *Maryland v. Craig*, 111 L.Ed.2d at 685. The finding of necessity must be based on something more than "mere nervousness or excitement or some reluctance to testify." *Maryland v. Craig*, 111 L.Ed.2d at 685.

The defendant's convictions in this case were premised primarily upon the out-of-court statements of the complaining witness. The declarant was not produced for

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to sexual acts on a child under 13. *See* Ill.Rev.Stat., 1987, Ch. 38, § 115-10. The statutory exception requires that the child must either testify at trial or be "unavailable as a witness."

cross-examination, the prosecution did not establish that she was unavailable, and the trial court made no case-specific finding of necessity. For these reasons, the use of the hearsay statements of the non-testifying complaining witness violated the Confrontation Clause and requires that the defendant be granted a new trial.

CONCLUSION

The Illinois Appellate Court violated the dictates of the Confrontation Clause by holding that the question of "[w]hether an out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court declarant is admissible under an exception or exemption to the hearsay rule." (J.A. 42) As Justice Harlan once cautioned:

> There is no reason in fairness why a State should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available.
>
> *California v. Green*, 399 U.S. 149, 187 (1970) (Harlan, J., concurring).

Accordingly, the decision of the Illinois Appellate Court should be reversed.

In addition, the defendant's convictions should be reversed and this cause remanded for a new trial. The prosecution's case against the accused was premised primarily upon the out-of-court statements of the non-testifying complaining witness. The prosecution made no showing of necessity and there was no finding that the complainant was unavailable. Under these circumstances, the prosecution's reliance upon hearsay testimony violated the defendant's Sixth Amendment right to confront his accuser.

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No. 90-6113

In The

Supreme Court of the United States

October Term, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause requires the prosecution to show that a child declarant is unavailable to testify before the child's out-of-court statements may be admitted against the defendant at trial?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Statement of the Case contained in Petitioner's brief is generally correct. However, Respondent wishes to correct one inaccuracy, as well as recite a few additional salient facts which are contained in the record.

First, Petitioner states that "[f]ollowing the admission of the hearsay testimony, S.G. was brought to the courtroom for the purpose of testifying, but did not take the stand." (Brf. for Pet. at 2) This statement is not entirely correct. Following the admission of the testimony of the baby sitter, Toni DeVore (Vol. VI, R. 6-37), Dr. Michael Meinzen (Vol. VI, R. 43-63), and S.G.'s mother, Tammy Grigsby (Vol. VI, R. 64-97), the State attempted to call S.G.

to the stand. (J.A. 12) When she failed to take the stand at that time, the State instead called Officer Terry Lewis. (J.A. 12) After Lewis testified, the State attempted to recall S.G. (J.A. 13) When S.G. again failed to take the stand, the case was recessed until the following morning. (Vol. VI, R. 123) At that time, the State called the emergency room nurse, Cheryl Reents. (Vol. VII, R. 5-16)

The Petitioner's Statement of the Case also fails to apprise the Court of other evidence in the case which corroborated S.G.'s hearsay statements. Although Petitioner states that the baby sitter was awakened by S.G.'s screams at 4:00 a.m., the evidence also showed that S.G.'s mother observed Petitioner leaving a tavern at approximately 3:30 a.m. that morning. (Vol. VI, R. 73-74) The tavern was only a five-minute drive from the Grigsby residence. (Vol. VI, R. 75)

Moreover, the baby sitter testified that S.G. did not have any marks on her face or neck when she was put to bed the previous evening. (Vol. VI, R. 21) However, the following morning, she noticed a scratch on S.G.'s neck (Vol. VI, R. 21)

S.G.'s mother also testified that she noticed S.G. had bruises or red marks on her neck which were not there the previous night when she left the house. (Vol. VI, R. 81) Ms. Grigsby also checked S.G.'s vaginal area and found that it was "a little red." (Vol. VI, R. 81)

Officer Lewis noticed a small cluster of fresh scratches on the right side of S.G.'s mouth. There were also two long parallel scratches on the left side of S.G.'s

neck. (Vol. VI, R. 112-13) The scratches had actually broken the skin, but were no longer bleeding. (Vol. VI, R. 113)

Nurse Reents also testified as to the bruising on the left side of S.G.'s neck. (Vol. VII, R. 12) This was confirmed by Dr. Meinzen who described the bruising as extending over S.G.'s sternocleidomastoideus muscle. (Vol. VI, R. 51-52)

SUMMARY OF THE ARGUMENT

I. This Court has closely scrutinized the admission of hearsay which is most analogous to *ex parte* affidavits or depositions and has concluded that such evidence is merely "a weak substitute for live testimony" which offends the purposes of the Confrontation Clause. If, however, hearsay has evidentiary value independent of whatever testimony the declarant may later give in court, and does not bear a notable similarity to *ex parte* affidavits or depositions, as is the case with custodial confessions, a separate inquiry into unavailability is not mandated under the Confrontation Clause. *United States v. Inadi*, 475 U.S. 387 (1986); *Lee v. Illinois*, 476 U.S. 530, 548 n.2 (1986) (Blackmun, J., dissenting).

The hearsay statements admitted in this case have never been considered "weak substitutes for live testimony." Both spontaneous declarations and statements made for purposes of medical treatment gain their probative value from the circumstances in which they were made. Consequently, the use of such statements has never

been conditioned upon the unavailability of the declarant.

Under the common law, the use of many of today's most common hearsay exceptions was not conditioned upon a showing of unavailability. Moreover, Federal Rule of Evidence 803 includes 24 exceptions similarly not conditioned on such a showing. If the Petitioner's interpretation of the Confrontation Clause were correct – *i.e.*, that the hearsay statements of a non-testifying child victim in a sexual abuse case may be admitted only upon a case-specific finding of unavailability – the use of all the common-law hearsay exceptions not conditioned upon a showing of unavailability, as well as all federal and state exceptions based thereon, would violate the Constitution. Such an approach could lead to a quagmire, in that courts would be forced to develop a separate body of hearsay law, applicable only in criminal cases and only when the prosecution offers the hearsay.

Moreover, an unavailability requirement for all hearsay exceptions used in child sexual abuse cases would offer no significant benefit. First, unless the prosecution simply fails to produce an available child declarant for trial, the rule never actually serves to exclude evidence. In addition, the Compulsory Process Clause would assist any defendant in obtaining the testimony of a child declarant whose hearsay statement was admitted against him. Finally, most states have either hostile witness provisions or rules comparable to Federal Rule of Evidence 806 which allows the defendant to examine, as if under cross-examination, any hearsay declarant he may call as a witness.

An unavailability rule would, however, impose significant burdens on both the criminal justice system and the prosecution. First, a rule requiring a determination of unavailability, every time the prosecution seeks to admit a child's hearsay statement, automatically adds another avenue of appellate review for defendants in the ever-growing number of sexual abuse cases. Moreover, in every such case, the prosecution would be required to ensure the child victim's continuing availability for trial. In many sexual abuse cases, if the child manages to hold up emotionally until the time of trial, prosecutions are abandoned or result in generous plea agreements simply because the child either "freezes" when he or she gets to court, or is unable to give adequate testimony on the witness stand.

Several important state interests would be furthered if the prosecution is not constitutionally required to produce an available child victim for trial before introducing his or her out-of-court statements in a sexual abuse case. Indeed, this would be accomplished without sacrificing the Confrontation Clause's truth-seeking function.

First, if the state is not required to produce available child declarants, the state interest in preventing trauma to child witnesses in abuse cases is obviously advanced. At the same time, however, the accuracy of the evidence before the trier of fact is enhanced, thereby advancing both the societal interest in accurate fact-finding and the truth-seeking goal of the Clause. Indeed, the Court has recognized that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve*

the Confrontation Clause's truth-seeking goal." *Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157, 3169 (1990).

There are other compelling reasons why an unavailability requirement for child hearsay declarants in sexual abuse cases would impede accurate fact-finding. Children may have difficulty testifying at trial due to inferior long-term and short-term memories. Moreover, a child may experience guilt or fear when testifying, particularly when the defendant is a parent or relative who may have, over time, extracted a promise of secrecy from the ambivalent child by using coercion, threats, subtle persuasion, or bribes. Thus, the account given closer in time to the actual event is likely to be the more accurate. Additionally, given the impressionable nature of children, use of the prior, more contemporaneous account decreases the chances that any intervening outside influence by an adult was exerted over the child. Indeed, due to the unique circumstances surrounding a child's in-court testimony, especially in a sexual abuse case, his or her out-of-court statements are comparable, in terms of probative value, to the statements of co-conspirators analyzed in *Inadi*.

II. If proof of unavailability is required for admission of spontaneous declarations and statements made to medical personnel for purposes of treatment or diagnosis, the state made a "good-faith effort" to call the declarant as a witness in this case, only to find that she was emotionally or psychologically "unavailable."

If, as Petitioner suggests, the trial court was obligated to make a "case-specific finding of necessity," the State should be given the opportunity to prove S.G.'s

unavailability on remand before Petitioner is granted a new trial.

ARGUMENT

I. THE CONFRONTATION CLAUSE DOES NOT REQUIRE A SHOWING OF UNAVAILABILITY AS A CONDITION TO THE ADMISSION OF A CHILD VICTIM'S STATEMENTS IN A SEXUAL ABUSE PROSECUTION WHEN INTRODUCED UNDER MOST RECOGNIZED HEARSAY EXCEPTIONS.

A. The Primary Object Of The Confrontation Clause Was To Prevent Trial By *Ex Parte* Affidavit And Other Weak Substitutes For Live Testimony.

The right of confrontation originated in response to the practice of trying criminal defendants solely on the basis of *ex parte* affidavits or depositions, in lieu of a personal examination and cross-examination. Defendants were denied not only the opportunity of testing the recollection and sifting the conscience of a sworn witness before the trier of fact, but of the symbolic act of challenging their accuser face to face in an open and even contest in a public trial. *See generally* 1 J. Stephen, *A History of the Criminal Law of England* 326 (1883).

An *ex parte* affidavit or deposition is generally nothing but a less desirable substitute for live testimony. Either can be as detailed and sweeping as the examination of a live witness. Both are usually created in contemplation of litigation and, therefore, are subject to the self-serving influences associated with preparing for trial.

Similar factors come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. *See, e.g.*, Fed. R. Evid. 804(b)(1). Like an affidavit or deposition, former testimony is merely a weaker substitute for live testimony. Even if the declarant was under oath and subject to cross-examination at the time of his former testimony, the trier of fact's opportunity to observe his or her demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Fed. R. Evid. 804(b)(1) advisory committee's note.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court examined the unavailability requirement found in a long line of Confrontation Clause cases involving former testimony.[1] The Court summarized this case law, stating that "[i]n the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.

Six years later, the Court disavowed any suggestion that, under *Roberts*, no out-of-court statement would be admissible without a showing of unavailability. In *United States v. Inadi*, 475 U.S. 387 (1986), a case involving the use of co-conspirator statements of a non-testifying declarant, the Court's first step was to limit *Roberts* to the particular situation presented by it – the State's attempted use of the preliminary hearing testimony of a witness not produced

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[1] *See Reynolds v. United States*, 98 U.S. 145 (1879); *Mattox v. United States*, 156 U.S. 237 (1895); *Motes v. United States*, 178 U.S. 458 (1900); *Barber v. Page*, 390 U.S. 719 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

at the defendant's subsequent state criminal trial. 475 U.S. at 393. The Court reasoned that former testimony seldom has evidentiary value of its own, but is intended solely to replace live testimony. *Id.* at 394. If the declarant is available and the same information can be presented in the form of live testimony, there is little justification for relying on the weaker version. *Id.* The Court continued that "longstanding principles of the law of hearsay, also applicable to Confrontation Clause analysis, favor admitting the better evidence." *Id.* at 394. If, however, the declarant is unavailable, no "better" version of the evidence exists, and, out of necessity, the law allows the admission of the former testimony as a substitute for the live testimony. *Id.* at 394-95.

The situation is quite different when a declarant's in-court testimony would fail to reproduce a significant portion of the evidentiary value of his out-of-court statements. For example, because the statements of co-conspirators are made while the conspiracy is in progress, the statements provide evidence of the conspiracy's context that cannot be duplicated, even if the declarant testifies to the same matters in court. *Inadi*, at 395-96. This is especially true in that the declarant and the defendant will have changed from partners in crime to suspects or defendants in a criminal trial, each possessing information potentially damaging to the other.[2] *Id.* at 395. In

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[2] Petitioner's attempt to distinguish *Inadi* solely on the basis of the special relationship between co-conspirators is superficial at best. He ignores the Court's core point in the case which is that co-conspirator statements derive much of their probative value from the fact that "they are made in a context very different from trial." 475 U.S. at 396.

other words, because it is made in a context very different from trial, there is a necessity[3] for resorting to the out-of-court account.

Like the out-of-court statements of co-conspirators, virtually all admissible hearsay, other than former testimony, has irreplaceable probative value independent of whatever testimony the declarant may later give at trial. The two hearsay exceptions utilized in this case are illustrative of this point.

A spontaneous declaration or excited utterance gains its probative significance from the consideration that in the stress of nervous excitement, the reflective faculties are stilled and the utterance becomes the unreflecting and sincere expression of one's actual impression and belief. 6 J. Wigmore, *Evidence*, § 1749, at 199. Accordingly, such an extrajudicial assertion is better than is likely to be obtained from the same person on the stand, and it follows that unavailability of the witness need never be shown under this exception. *Id.* § 1748, at 199.

Statements made for purposes of medical treatment also gain their probative value from the fact that they are made at a time when circumstances lessen the possible inducement to misrepresent. Their value rests on the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the

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[3] "Necessity" in the sense that the declarant's out-of-court assertion "may be such that we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources." 5 J. Wigmore, *Evidence*, § 1421 (Chadbourn rev. 1974) (emphasis in original).

accuracy of the information he provides the physician.[4] E. Cleary, *McCormick on Evidence* § 292, at 839 (3d ed. 1984). Statements of physical or mental condition made on the stand, where there is ample opportunity for deliberate misrepresentation and small means for checking it with other evidence or testing it by cross-examination, are comparatively inferior to the extrajudicial statements made to a physician. Accordingly, it follows that unavailability of the declarant is not a condition precedent to the use of such statements. 6 J. Wigmore, *supra*, § 1714, at 90.

Courts have drawn a distinction between statements made to a physician consulted for purposes of treatment and those made to a physician for purposes of medical diagnosis, including those made to enable the doctor to testify. The distinction is based on the conclusion that where the declarant does not anticipate that his treatment's effectiveness will depend on the truthfulness of his statements, the rationale underlying the exception does not exist. E. Cleary, *supra*, § 293, at 841. This distinction, however, does not warrant treating such statements

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[4] Because of the strong assurance of reliability, courts have expanded the exception to include statements concerning past symptoms if regarded by the patient as related to treatment. *Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882); *Kennedy v. Upshaw*, 66 Tex. 442, 1 S.W. 308 (1886); *Missouri, Kansas & Texas Railway Co. v. Dalton*, 56 Tex.Civ.App. 82, 120 S.W. 240 (1909); *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940); *see* Fed. R. Evid. 803(4). In some cases, the special assurance of reliability – the patient's belief that accuracy is essential to effective treatment – also applies to statements concerning cause. *Shell Oil Co. v. Industrial Commission*, 2 Ill.2d 590, 119 N.E.2d 224 (1954); *see* Fed. R. Evid. 803(4).

differently with respect to the requirement of unavailability. *See* Fed. R. Evid. 803(4) (availability of declarant immaterial regardless of whether statement is made for purposes of diagnosis or treatment). Although the probative value of statements made only for the purpose of enabling the physician to testify does not rest on the same rationale underlying statements made for purposes of treatment, the statements are still made in a "context very different from trial" and derive their significance from the circumstances in which they were made. As stated above, statements of pain or symptoms made in court, where there is abundant opportunity for fabrication and limited means for effectively exposing inaccuracies through cross-examination, are proportionately inferior to extrajudicial statements made to a physician, even if solely for the purpose of enabling the doctor to give his expert opinion later at trial. The declarant is less likely to contrive symptoms when consulting a member of the medical profession who he or she realizes has the ability to evaluate the accuracy of the statements made. *See* E. Cleary, *supra*, § 293, at 842 ("[t]he general reliance upon 'subjective' facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms.").

There is, however, a type of admissible hearsay which – although it has independent evidentiary value derived from the context in which it was made – bears such similarity to *ex parte* affidavits or depositions as to call for close examination under the Confrontation Clause: third-party custodial confessions. Custodial confessions can include all the detail of an affidavit or

deposition, and like the affidavits and depositions used to convict during the seventeenth century, they are ordinarily obtained *ex parte*, in contemplation of litigation, and with the participation of the prosecution. Since a custodial confession shares so many of the characteristics of an affidavit or deposition, it, like former testimony, is nothing more than a "weak substitute for live testimony" and is thus subject to an unavailability requirement. *See Lee v. Illinois*, 476 U.S. 530, 548 n.2 (1986) (Blackmun, J., dissenting) (" . . . [A] specific showing of unavailability is not always required. I nonetheless assume, for purposes of discussion, that in relevant respects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi*, and thus that both *Roberts* requirements had to be satisfied").

In short, this Court has closely scrutinized the admission of hearsay which is most analogous to *ex parte* affidavits or depositions, the quintessential "weak substitutes for live testimony" which the Confrontation Clause was developed to prevent. If, however, hearsay has evidentiary value independent of whatever testimony the declarant may later give in court, and does not bear a notable similarity to *ex parte* affidavits or depositions as is the case with custodial confessions, a separate inquiry into unavailability is not mandated under the Confrontation Clause. *See also* Haddad, *The future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Line of Confrontation Decisions*, 81 *J.Crim.L. & Criminology* 77, 82 (1990). The hearsay admitted in this case fulfills both criteria.

B. Under the Common Law, the Use of Many of Today's Frequently Used Hearsay Exceptions Was Not Conditioned Upon the Unavailability of the Declarant.

This Court has held that although the Confrontation Clause differs in significant ways from the common-law rule against introduction of hearsay, the two "stem from the same roots," (*Dutton v. Evans*, 400 U.S. 74, 86 (1970) (*plurality opinion*)), and "protect similar values." *California v. Green*, 399 U.S. 149, 155 (1970). Accordingly, analysis under the Confrontation Clause "is informed . . . by hearsay principles developed over time by courts and legislatures." *Lee v. Illinois*, 476 U.S. at 551 (Blackmun, J., dissenting).

Under the common law, the use of many of today's most common hearsay exceptions was not conditioned upon a showing of unavailability of the declarant. Only if the exception originated as a result of necessity, due to the great difficulty or impossibility of proving certain facts by living witnesses, was unavailability required.[5]

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[5] Two hearsay exceptions which have historically required unavailability are dying declarations and declarations about family history. *See* Fed. R. Evid. 804(b)(2) and 804(b)(4). However, both exceptions have independent probative value derived from the circumstances in which they were made and, accordingly, would not constitutionally require a showing of unavailability under the Court's reasoning in *Inadi*.

An anomaly is the declaration against proprietary or pecuniary interest which gains its evidentiary value from the consideration that a statement asserting a fact against one's interest is unlikely to be deliberately false or heedlessly incorrect. 5 J. Wigmore, *supra*, § 1457. Although the unavailability

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For example, the hearsay exception for public records was not conditioned upon a showing of unavailability at common law. Given the volume of business in public offices, the official written statement of a public official, for whom it would also be practically inconvenient to regularly appear in court, is thought to be more reliable than his present memory if he were to take the stand. E. Cleary, *supra*, § 315, at 889. Although necessity plays a part in the rationale underlying this exception, the overriding impetus appears to have been the preference for resorting to the earlier statement, thought to be more valuable than a later statement made by the declarant at trial. Consequently, unavailability was not a requirement.

Although the hearsay exception for regularly kept records included a requirement of unavailability at common law,[6] by the middle of the twentieth century, that

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requirement at common law, apparently based on the impossibility of obtaining the declarant's testimony on the stand, has continued and is now largely standardized, its logic has been questioned in that the rationale which admits other hearsay statements without regard to the availability of the declarant seems equally applicable to declarations against interest. *See, e.g.*, 5 J. Wigmore, *supra*, § 1455, at 324; Note, *Declarations Against Interest: A Critical Review of the Unavailability Requirement*, 52 *Cornell L. Rev.* 301 (1967). Additionally, under the reasoning of *Inadi*, a showing of unavailability would not be constitutionally required for the use of statements falling under this exception.

[6] At common law, if the person who made a business record were present as a witness, the record could be used to refresh his recollection, or if still unable to recall the facts, his testimony might qualify the record as past recollection

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requirement had virtually disappeared for the same reasons it was disregarded in the public records exception. *E.g., Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co.*, 18 F.2d 934, 938 (2d Cir. 1927) ("It ought to appear that . . . the missing entrants, if called, would in the nature of things have no recollection of the events recorded and could do no more than corroborate the existing testimony as to the course of business in which they had a part.").

Termed in the Advisory Committee Notes a "synthesis" of the common-law hearsay exceptions in which unavailability of the declarant is irrelevant, Federal Rule of Evidence 803 includes 24 exceptions similarly not conditioned on such a showing. *See* Fed. R. Evid. 803(1)-(24). Only five of the hearsay exceptions recognized in the federal rules require the unavailability of the declarant. *See* Fed. R. Evid. 804(b)(1)-(5).

If the Petitioner's interpretation of the Confrontation Clause were correct – *i.e.*, that the hearsay statements of a non-testifying child victim in a sexual abuse case may be admitted only upon a case-specific finding of unavailability – the use of all the common-law hearsay exceptions not conditioned upon a showing of unavailability, as well as all federal and state exceptions

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recorded. If, however, the declarant were unavailable, then these avenues to admissibility for the business record could not be used. Thus, a need for a special hearsay exception for business records arose. As sometimes happens, the reason why the rule came into existence was incorporated into the rule as a requirement. E. Cleary, *supra*, § 311, at 880.

based thereon, would violate the Constitution. Commentators have predicted that, generally, such an approach could lead to a "quagmire," in that courts would be forced to develop a separate body of hearsay law, applicable only in criminal cases[7] and only when the prosecution offers the hearsay. *See* Haddad, *supra*, 81 *J.Crim.L. & Criminology* at 80.

This Court should be most reluctant to utilize the Confrontation Clause as a vehicle for examining established evidentiary law. *See Dutton v. Evans*, 400 U.S. at 96 (Harlan, J., concurring) ("[t]he [confrontation] clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence."). Both the Court and individual justices have frequently observed as well that the Confrontation Clause should not be interpreted in a way that would curtail development of the law of evidence. *See, e.g., Ohio v. Roberts*, 448 U.S. at 64-65; *Dutton v. Evans*, 400 U.S. at 80, 86 n.17; *id.* at 95-96 (Harlan, J., concurring); *California v. Green*, 399 U.S. at 171-72 (Burger, C.J., concurring).

Finally, if the hearsay exceptions that are not conditioned upon a showing of unavailability are not presumptively harmonious with the Confrontation Clause, this Court will eventually be forced to examine all such exceptions with respect to the question of unavailability,

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[7] If limited solely to the facts of this case, Petitioner's proposed rule would, oddly enough, require courts to develop a separate body of hearsay principles applicable only to non-testifying victims in child sexual abuse prosecutions.

including the firmly rooted ones. This would be a duplicative and time-consuming process, found by the Court to be unnecessary with respect to the question of reliability where the evidence falls within a firmly rooted hearsay exception. *Roberts*, 448 U.S. at 66; *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987) (independent indicia of reliability not required when hearsay statement falls within exception for co-conspirator statements).

C. An Unavailability Requirement for All Hearsay Exceptions Used in Child Sexual Abuse Cases Would Offer No Significant Benefit, But Would Place Significant Burdens on the Prosecution and the Criminal Justice System.

In *Roberts*, the Court noted that a demonstration of unavailability is not required where the utility of trial confrontation is remote. 448 U.S. at 65 n.7 (citing *Dutton v. Evans*). In *Inadi*, the Court also relied on this reasoning in concluding that the Confrontation Clause does not require the unavailability of the declarant before admitting co-conspirator statements.

First, the Court found that an unavailability requirement would not serve to actually exclude any evidence "unless the prosecution makes the mistake of not producing an otherwise available witness." *Inadi*, 475 U.S. at 396. In other words, if the declarant is truly unavailable, or is available and produced by the prosecution, his out-of-court statements are invariably admitted. Consequently, the Court continued, "the unavailability rule cannot be defended as a constitutional 'better evidence rule.' " *Id.* (Compare the so-called "best evidence" rule: " . . . the best evidence the nature of the case will admit . . . shall

always be required, if possible to be had; but if not possible then the best evidence that can be had shall be allowed." E. Cleary, *supra*, § 229, at 703.)

Second, the *Inadi* Court reasoned that an unavailability rule would not produce much testimony that "adds anything to the 'truth-determining process' over and above what would be produced without such a rule." *Id.* If the prosecution decides not to call the declarant, but the defendant still wants to secure the declarant's testimony, he has several options available. Specifically, the Sixth Amendment guarantees a defendant the right of compulsory process to obtain the presence of witnesses in his defense. *Id.* at 397. Also, under Federal Rule of Evidence 806, if the defendant does call the declarant as a witness, he is entitled to examine him or her on the statement as if under cross-examination. *Id.* The Court thus concluded that if the defense chooses not to subpoena such a declarant, "either as a witness favorable to the defense, or as a hostile witness, or for cross-examination under Federal Rule of Evidence 806, then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.' " *Id.* at 398.

The reasoning of *Inadi* applies not just to co-conspirator statements, but to all admitted hearsay. Unless the State simply fails to produce an available witness, an unavailability rule never serves to actually exclude evidence. Moreover, the Compulsory Process Clause would assist any defendant in obtaining the testimony of a hearsay declarant whose statement was admitted against him. In Illinois specifically, if the declarant is unwilling or hostile, he or she may be examined by the defendant as if

under cross-examination. Ill. Rev. Stat. 1989, Ch. 110A, § 238 (made applicable to criminal cases by § 433). Similar provisions are followed by statute or court rule in many states. *See generally* 81 Am. Jur. 2d *Witnesses* § 494 (1976). Finally, most states have adopted rules identical or similar to Federal Rule of Evidence 806.[8] Accordingly, for the same reasons that the Court concluded that an unavailability requirement for co-conspirator declarants would not promote truth-finding, likewise, the truth-seeking process would not be enhanced by a general rule requiring the prosecution to assure the availability of all

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[8] The following states have rules comparable to Federal Rule of Evidence 806: Alaska: Alaska R. Evid. 806; Arizona: Ariz. R. Evid. 806; Arkansas: Ark. Unif. R. Evid. 806; California: Cal. Evid. Code § 1203; Colorado: Colo. R. Evid. 806: Delaware: Del. Unif. R. Evid. 806; Florida: Fla. Stat. § 90.806; Hawaii: Hawaii R. Evid. 806; Iowa: Iowa R. Evid. 806; Kentucky: Ky. R. Evid. 806; Louisiana: La. Code of Evid. art. 806; Maine: Me. R. Evid. 806; Michigan: Mich. R. Evid. 806; Minnesota: Minn. R. Evid. 806; Mississippi: Miss. R. Evid. 806; Missouri: Mo. R. Evid. 806; Montana: Mont. R. Evid. 806; Nebraska: Neb. Rev. Stat. § 27-806; Nevada: Nev. Rev. Stat. 51.069; New Hampshire: N.H. R. Evid. 806; New Mexico: N.M. R. Evid. 806; North Carolina: N.C. R. Evid. 806; North Dakota: N.D. R. Evid. 806; Ohio: Ohio R. Evid. 806; Oklahoma: Okla. Stat. tit. 12, § 2806; Oregon: Or. Evid. Code § 40.475; Rhode Island: R.I. R. Evid. 806; South Dakota: S.D. Codified Laws § 19-16-37; Tennessee: Tenn. R. Evid. 806; Vermont: Vt. R. Evid. 806; Washington: Wash. R. Evid. 806; West Virginia: W. Va. R. Evid. 806; Wisconsin: Wis. R. Evid. 908.06; and Wyoming: Wyo. R. Evid. 806.

children whose hearsay statements are introduced against the defendant in sexual abuse cases.

Such a rule would, however, impose significant burdens. First, the *Inadi* Court's concerns about the "substantial burden on the entire criminal justice system" (475 U.S. at 398) apply with equal or greater force to Petitioner's proposed rule. A constitutional rule mandating a determination of unavailability every time the prosecution seeks to admit a child's hearsay statement automatically adds another avenue of appellate review for defendants in the ever-growing number of sexual abuse cases.[9]

Moreover, an unavailability requirement in such cases places a significant practical burden on the prosecution. In every case involving the use of a child's prior out-of-court statements which disclose an alleged act of sexual abuse, the prosecution would be required to ensure the child's continuing availability for trial. In *State v. Sheppard*, the New Jersey Superior Court noted the following with respect to the difficulties attending the presentation of children's testimony in abuse cases:

> In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents [him or] her from testifying or makes the testimony obviously inaccurate or inadequate.

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[9] Between 1976 and 1985, the number of reported incidents of child maltreatment rose from .67 million to over 1.9 million (11.7% of the 1985 cases alleged sexual abuse). *Coy v. Iowa*, 487 U.S. 1012, 1031 (1988) citing to *Am. Ass'n for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting* 1985, pp. 3, 18 (1987) (Blackmun, J., dissenting).

> One attorney, who had handled 30 to 40 of these cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, [he or] she could not testify in court face-to-face with the accused and other relatives. The victim either refused to testify or "froze" when she got to court. Children who did testify, *e.g.*, before a grand jury, frequently "forgot" details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer.

197 N.J. Super. 411 at 417, 484 A.2d 1330 at 1333 (1984).

Finally, as the Court noted with respect to co-conspirator declarants in *Inadi*, an unavailability rule would impose these burdens regardless of whether either party actually desired to examine the child at trial. 475 U.S. at 399.

D. There Are Compelling Public Policy Reasons Why A Child's Out-of-Court Statements Are Admissible Without Regard to Availability.

Several important state interests would be furthered if the prosecution is not constitutionally required to produce an available child victim for trial before introducing his or her out-of-court statements in a sexual abuse case. Indeed, this would be accomplished without sacrificing the Confrontation Clauses' truth-seeking function.

The Court's precedents establish that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial." *Roberts*, 448 U.S. at 63. This preference,

however, "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243.

The states possess several substantial interests with respect to the prosecution of child sexual abuse cases. Generally, a state has a strong interest in criminal justice; conviction rates for juvenile sex abuse cases remain strikingly low while reports of abuse continue to escalate annually. Recent Development, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 *Vand.L.Rev.* 1511, 1512 (1989). In addition, the State has a strong societal interest in the physical and psychological well-being of minors who are victims of sexual abuse. *Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157, 3167 (1990). Accordingly, the Court has held that, if the State makes an adequate showing of necessity,[10] it may resort to the use of special procedures implemented specifically for the purpose of allowing a child witness in an abuse case to avoid face-to-face confrontation with the defendant at trial. *Id.* at 3169.

The Court's precedents also recognize " 'a societal interest in accurate fact-finding which may require consideration of out-of-court statements.' " *Id.* at 3165, quoting *Bourjaily*, 483 U.S. at 182. The Court has attempted to

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[10] Because the necessity is based *solely* on furthering the state interest in protecting child witnesses from testifying in *the presence of the defendant* in a child abuse case, the requisite finding must be a case-specific one in which the trial court concludes that the particular child witness who seeks to testify would be traumatized by testifying in the presence of the defendant. *Craig*, 110 S.Ct. at 3169 (emphasis added).

harmonize this interest with the goals of the Clause – one of which is also to promote the truth-seeking process in criminal trials.

If the prosecution is not required to produce available child hearsay declarants in sexual abuse cases, the state interest in preventing trauma to child witnesses in such cases is obviously furthered. At the same time, however, the accuracy of the evidence before the trier of fact is enhanced, thereby advancing both the societal interest in accurate fact-finding and the truth-seeking goal of the Clause. Indeed, the Court has recognized that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal." *Craig*, 110 S.Ct. at 3169 (emphasis in original; citations omitted). *See also* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 *Colum. L. Rev.* 1745, 1751-52 (1983); Recent Development, *supra*, 42 *Vand. L. Rev.* at 1513.

There are other compelling reasons why admitting a child declarant's out-of-court statements, without regard to availability, promotes accurate fact-finding. A growing body of academic literature buttresses many jurists' conclusion[11] that a child's in-court testimony fails to reproduce a significant portion of the evidentiary value of his or her out-of-court statements. The child may have difficulty testifying at trial due to fading memory,[12] as well as

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[11] *See e.g., Nelson v. Farrey*, 874 F.2d 1222, 1230 (7th Cir. 1989).

[12] A.D. Yarmey, *The Psychology of Eyewitness Testimony* 204-05 (1979) (children posses inferior long-term and short-

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guilt or fear, particularly when the abuser is a parent or relative who may have, over time, extracted a promise of secrecy from the ambivalent child by using coercion, threats, subtle persuasion, or bribes.[13] Thus, the account given closer in time to the actual event is likely to be the more accurate. Moreover, given the impressionable nature of children, use of the prior, more contemporaneous account decreases the chances that any intervening outside influence by an adult was exerted over the child.[14] Indeed, it should be noted that due to the unique circumstances surrounding a child's in-court testimony, especially in a sexual abuse case, his or her out-of-court statements are comparable, in terms of probative value, to the statements of co-conspirators analyzed in *Inadi*.

Finally, because many children are unable to testify in open court, or are so overwhelmed on the witness

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term memories when compared to adults); Stevens & Berliner, *Special Techniques for Child Witnesses, The Sexual Victimology of Youth* 246, 254 (L. Schultz ed. 1980) (child's memory of detail blurs quickly). *But see* Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 *J.Soc.Issues* (no. 2) 33, 34, 36 (1984) (there is considerable evidence that children typically recall less than adults, but available evidence does not necessarily support assertion that "forgetting occurs more rapidly in children.").

[13] *Sexual Assault of Children and Adolescents* 85-98 (A.W. Burgess ed. 1978).

[14] *See* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, *72 Minn. L. Rev.* 523, 532 n.39 (1988) (suggestiveness by an authority figure, especially a parent involved in a custody dispute, should not be underestimated).

stand as to prevent the possibility of effective testimony, rates of conviction for child sex abuse cases will remain low unless the prosecution is able to resort to the use of a child's out-of-court statements – which often constitute the only proof of the crime,[15] – without regard to availability. In essence then, an unavailability rule, as Petitioner proposes, would prevent the efficient and effective prosecution of child abusers and ultimately result in the impediment of the State's significant interest in criminal justice.

E. Not Only Legal Precedent, but Practicality Requires that this Court Reject Petitioner's Proposed "Rule of Necessity."

In sum, it is the admission of hearsay which amounts to nothing more than a "weak substitute for live testimony" that disserves the symbolic and truth-seeking goals of the Confrontation Clause. Accordingly, such hearsay requires an inquiry into unavailability in that it can only be used when use of live testimony is not possible.

The hearsay statements admitted in this case have never been considered "weak substitutes for live testimony." Both spontaneous declarations and statements made for purposes of medical treatment gain their probative value from the circumstances in which they are made. Consequently, the use of such statements has never been conditioned upon the unavailability of the declarant.

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[15] *See* Note, *supra*, 83 *Colum. L. Rev.* at 1749.

Moreover, due to the unique circumstances surrounding a child's in-court testimony, especially as the complainant in a sexual abuse case, his or her out-of-court statements, made closer in time to the actual event, have probative value which will most likely not be duplicated on the witness stand. The situation in the case at bar buttresses this assertion. S.G. was apparently so emotionally distraught by the time she was called to testify that she could not even take the stand, let alone give adequate testimony.

From a practical standpoint, it must be kept in mind that if this Court adopts a rule such as Petitioner proposes, all of the federal and state hearsay exceptions, as well as their common-law antecedents, would violate the Constitution, not only in child sexual abuse cases, but most likely in all criminal cases. In light of the fact that an unavailability requirement for all hearsay exceptions, even if limited to child abuse cases, would offer no significant benefit, but would place considerable burdens on the prosecution and the criminal justice system, such a rule should be rejected.

Finally, Petitioner does not dispute the trial court's conclusion that S.G.'s out-of-court statements fell within the common law hearsay exceptions for spontaneous declarations and the Illinois statutory exception for statements made to medical personnel for purposes of treatment or diagnosis. Indeed, the admissibility of the evidence under state law is not the issue here; rather the question is whether, because S.G. did not take the stand, nor was she declared "unavailable" by the trial court, the admission of her hearsay statements denied Petitioner his rights under the Confrontation Clause. As fully set out

above, the use of these two exceptions has never been conditioned upon a showing of unavailability; nor does the Confrontation Clause require that it must.[16] Therefore, assuming, *arguendo*, that the prosecution did not make a showing of unavailability in this case, the admission of S.G.'s out-of-court statements did not violate Petitioner's sixth amendment right to confrontation.

II. IF PROOF OF UNAVAILABILITY IS REQUIRED FOR ADMISSION OF SPONTANEOUS DECLARATIONS AND STATEMENTS MADE TO MEDICAL PERSONNEL FOR PURPOSES OF TREATMENT OR DIAGNOSIS, THE STATE MADE A "GOOD-FAITH EFFORT" TO CALL THE DECLARANT AS A WITNESS, ONLY TO FIND THAT SHE WAS EMOTIONALLY OR PSYCHOLOGICALLY "UNAVAILABLE."

If the Petitioner is correct in his assertion that the State may not introduce spontaneous declarations or

---

[16] These two exceptions are firmly rooted in that they "possess the imprimatur of judicial and legislative experience." *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139, 3147 (1990). However, that is not to say that a showing of unavailability is always required in cases in which the prosecution must show the "particularized guarantees of trustworthiness" of hearsay which does not fall within a well-recognized hearsay exception. Indeed, it appears that such a particularized showing of reliability can be made without regard to unavailability. *See Lee v. Illinois*, 476 U.S. at 548 n.2 (Blackmun, J., dissenting) (custodial confession, which is presumptively unreliable, is more like prior judicial testimony than like co-conspirator statements, and thus both unavailability and reliability requirements of *Roberts* must be satisfied). This is important in child sexual abuse cases in that the hearsay statements of children do not always fit within firmly rooted hearsay exceptions.

statements made to medical personnel for purposes of treatment or diagnosis without producing the declarant or showing his or her unavailability, Petitioner was still not denied his sixth amendment rights in this case. Indeed, the prosecution made a sufficient showing of unavailability.

Acting under the assumption that "the Confrontation Clause generally requires a showing of unavailability," (*Ohio v. Roberts*, 448 U.S. at 66), jurists and scholars have considered the admissibility of the out-of-court statements of non-testifying children. Many have found psychological unavailability satisfactory to meet the Roberts unavailability requirement. *See, e.g., State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 813 (1987) (affirming trial court's finding of unavailability because of existing mental infirmity based solely on expert testimony "indicating the [child] would be uncommunicative if asked about the assault and could be further traumatized by courtroom proceedings"); *Glendening v. State*, 503 So.2d 335, 337 (Fla. Dist. Ct. App. 1987) (upholding special hearsay statute with unavailability provision for absence due to substantial likelihood of severe emotional or mental harm); *Altmeyer v. State*, 496 N.E.2d 1328, 1331 (Ind. App. 1 Dist. 1986) (finding child unavailable, though competent, because trial "participation would be a traumatic experience"); *People v. Johnson*, 146 Ill.App.3d 640, 497 N.E.2d 308, 312 (Ill.App. 5 Dist. 1986) (child witness who is physically present is nevertheless "unavailable" for confrontation purposes if psychologically unable to testify); *see also* Comment, *Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 *J.Juv.Law* 59, 70 (1984) (concluding that "child's incompetence or refusal to

answer questions when on the stand does not preclude such admission [of hearsay] and can, therefore, be considered equivalent to legal unavailability").

The Confrontation Clause also requires that the prosecution make a "good-faith effort" to obtain the presence of the declarant at trial. *Ohio v. Roberts*, 448 U.S. at 74. The ultimate question is whether the witness is unavailable depite the "good-faith efforts" undertaken prior to trial to locate and present that witness. *Id.*

In the instant case, the State clearly made a "good-faith effort" to present S.G. as a witness; she was called to the witness stand twice. However, the child was emotionally unavailable to testify. At that time, defense counsel acknowledged that S.G. did not testify because she was emotionally distressed. (J.A. 14)

This Court has made it clear that "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. at 74. As is apparent from the record in this case, the calling of S.G. as a witness was just such an act. The law required nothing more of the State.

If, as Petitioner suggests, the trial court was obligated to make a "case-specific finding of necessity," the State should be given an opportunity to prove unavailability on remand before Petitioner is granted a new trial. Requiring a new trial without a remand hearing would needlessly penalize society, as well as waste judicial and prosecutorial resources if, upon remand, the State is able to show that S.G. was indeed unavailable. In such case, her out-of-court statements were properly admitted and thus there would be no need for a new trial. If S.G. was in fact unavailable, as Respondent maintains she was,

allowing the prosecution to prove her unavailability after the introduction of her statements, as opposed to before, does not in any way alter the proof of Petitioner's guilt.

CONCLUSION

For all of the foregoing reasons, the People of the State of Illinois respectfully request that the decision of the Appellate Court of Illinois, Fourth Judicial District, be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

RANDALL D. WHITE,
Petitioner,

v.

ILLINOIS,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fourth Judicial District

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

THE CONFRONTATION CLAUSE REQUIRES THAT THE HEARSAY STATEMENTS OF A NON-TESTIFYING COMPLAINING WITNESS IN A CHILD ABUSE PROSECUTION SHOULD BE ADMITTED ONLY UPON A CASE-SPECIFIC FINDING OF NECESSITY: THE TRIAL COURT SHOULD HEAR EVIDENCE AND DETERMINE IF THE CHILD IS UNAVAILABLE TO TESTIFY.

Respondent argues that the prosecution should be allowed to substitute admissible hearsay for the testimony of the complaining witness in child abuse prosecutions, reasoning that such a procedure would spare the child witness the trauma of testifying. However, while Respondent's argument correctly identifies the state's interest in the welfare of the child witness, it overlooks the defendant's countervailing Sixth Amendment right to the adversarial testing of the prosecution's evidence before the trier of fact.

These competing interests were recently addressed in *Maryland v. Craig*, 497 U.S. ——, 111 L.Ed.2d 666 (1990), where the Supreme Court enunciated a rule of necessity. By requiring the prosecution to either produce the child witness or demonstrate her unavailability, the rule of necessity properly balances the state's interest in the welfare of the child witness with the defendant's constitutional right to confront his accuser, thereby "preserv[ing] the adversary nature of the trial." *Maryland v. Craig*, 111 L.Ed.2d at 686. An examination of Respondent's argument fails to reveal any convincing reason why the rule of necessity should not be applied here.

A. Respondent Mistakes the Confrontation Clause for a Rule of Evidence.

Respondent likens the Confrontation Clause to a "better evidence rule" and reasons that admissible hearsay satisfies the confrontation right because such evidence is presumptively reliable and has independent probative value. Pursuant to this evidentiary analysis, Respondent concludes that if an out-of-court statement falls within an exception to the hearsay rule it has sufficient reliability to satisfy Confrontation Clause requirements, regardless of the defendant's inability to cross-examine the absent declarant.

Such reasoning, however, mistakes the Confrontation Clause for the hearsay rule. While reliability is the primary justification for exempting an out-of-court statement from the hearsay rule (*Chambers v. Mississippi*, 410 U.S. 284, 298 (1978)), the core purpose of the Confrontation Clause is to assure the accused the opportunity to confront his accuser. Notwithstanding Respondent's attempt to redefine the confrontation right in evidentiary terms, the language of the Sixth Amendment speaks for itself:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .
>
> U.S. Const., amend. VI.

Accordingly, this Court recently reiterated that the Confrontation Clause contains not only a reliability requirement, but an unavailability rule as well:

> [The] confrontation clause "operates in two separate ways to restrict the range of admissible hearsay.
>
> First, in conformance with the Framers' preference for face-to-face accusation the Sixth Amendment establishes a rule of necessity. *In the unusual case . . ., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.*"
>
> Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability'. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception . . ."
>
> *Idaho v. Wright*, 111 L.Ed.2d at 651-52 quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (citations omitted; emphasis added).

Although the foregoing language clearly states that the rule of necessity applies "*in the usual case*", Respondent argues that the unavailability requirement was intended to apply only in the case of former testimony, reasoning that former testimony "is intended solely to replace live testimony." (State's Brief at 10) However, such reasoning overlooks the fact that under the procedure advocated by Respondent, hearsay testimony would be substituted for the live testimony of the child witness. For this very reason, the admission of the absent declarant's out-of-court statements in this case is analogous not only to the use of former testimony, but the use of closed-circuit testimony as well. *See Maryland v. Craig*, 111 L.Ed.2d 686

(applying unavailability requirement to the use of closed-circuit testimony in lieu of the child complainant's live testimony at trial).

Respondent reasons that unlike former testimony, virtually all other admissible hearsay "has irreplaceable probative value *independent of whatever testimony the declarant may later give at trial.*" (State's Brief at 10; emphasis added) However, such reasoning overlooks the fact that in this case *the declarant did not later testify at trial.* Therefore, regardless of whatever probative value the hearsay may have had to the prosecution's case against the accused, the fact remains that the hearsay was also used to replace the declarant's live testimony.

Respondent concludes this evidentiary analysis by suggesting that the unavailability requirement offers no significant benefit because it "never serves to actually exclude evidence." (State's Brief at 19) However, unlike the hearsay rule, the purpose of the Confrontation Clause is not to exclude evidence, but rather to guarantee the defendant an adversary proceeding. The unavailability requirement implements this guarantee by ensuring that the accused will be given the opportunity to confront his accuser, if at all possible.

B. Respondent's Assumptions Regarding the Reliability of Child Hearsay Are Suspect.

Respondent's argument is premised on the assumption that child hearsay, when admitted under a recognized exception to the hearsay rule, is inherently reliable and absolutely trustworthy. This premise is suspect for several reasons.

Recent research has shown how easy it is for youngsters to stray from the truth. The young child is more vulnerable to suggestion than an adult and more likely to confuse memory of fact with memory of fantasy. Christensen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62

Wash.L.Rev. 705, 708-11 (1987). Cautioning that the problem of suggestiveness by an authority figure "should not be underestimated," one commentator has explained that:

> A child's complaint of sexual abuse might have resulted from a desire to please, from fear, or from uncritical acceptance of what the child thinks the authority figure believes has happened. Very young children especially might over time accept the suggested event as true and recall it as if it had really occurred.
>
> Graham, *The Confrontation Clause, the Hearsay Rule, and Child Abuse Prosecutions: The State of the Relationship*, 72 Minn.L.Rev. 523 at n.39 (1988).

Furthermore, child hearsay is not necessarily rendered trustworthy by the mere fact that it falls within a recognized exception to the hearsay rule. The instant case is illustrative.

Hearsay testimony in this case was admitted against the accused pursuant to the spontaneous declaration or excited utterance exception to the hearsay rule. It has been recognized that "[e]xcited utterances vary tremendously in their trustworthiness." Binder, *Hearsay Handbook*, § 6.08 at 80 (1975). In fact, although spontaneous declarations are considered reliable, it has been noted that the entire basis for the exception is subject to question:

> While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment.
>
> *Hearsay Handbook*, § 297 at 855.

Nevertheless, even assuming the reliaibility of "spontaneous" statements that are "made nearly simultaneously

with the relevant event" (Brief of Solicitor General at 13), the rationale underlying the exception is certainly inapplicable to the hearsay testimony of the police officer that was admitted against the accused in this case. The police officer interviewed the child approximately 45 minutes after the relevant event. (J.A. 34) After putting the child at ease by talking about cartoons, the officer elicited the child's version of the incident through the use of leading questions. (Vol. VI, R. 110-12)

In light of the foregoing circumstances, it is clear that the child was not "excited" when she responded to the police officer's questions, the child's answers to the leading questions cannot fairly be characterized as "spontaneous," and it cannot be said that the interview was "simultaneous" with the relevant event. Nevertheless, the Illinois Appellate Court held that the child's statements were spontaneous declarations, reasoning that "[t]he trial court has considerable discretion in determining whether a statement is admissible as a spontaneous declaration, and its decision will not be reversed absent an abuse of that discretion." (J.A. 36)

The Illinois Appellate Court also upheld the admission of statements the child made to medical personnel, pursuant to an admittedly "liberal" interpretation of the medical treatment exception. (J.A. 38) The rationale for this exception is that a patient's selfish interest in receiving appropriate treatment guarantees the trustworthiness of the statement. It is far from clear, however, that the five-year-old child in this case recognized a selfish interest related to treatment. *See State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801 (1987) (recognizing that young children do not always grasp the relationship between their statements and treatment). In fact, the record reveals that the child advised the medical personnel that she was not injured; the examination revealed "no tenderness, no soreness of any kind" (Vol. VI, R. 57); and the examining physician testified that all his findings were "negative." (Vol. VI, R. 57)

Furthermore, although the hearsay was admitted under the medical treatment exception, the statements did not pertain to medical treatment at all. Rather, the hearsay testimony merely reiterated the child's version of the incident. While acknowledging that the hearsay related to the "details of the alleged offense" rather than "presently existing bodily condition," the Illinois Appellate Court concluded that:

> [S]ection 115-13 [statutory hearsay exception] was designed, in part, to sever the artificial restraints heretofore imposed by case law on the ability of a physician to testify about what his or her patient told the physician for purposes of medical diagnosis or treatment.
>
> (J.A. 39)

The Illinois Appellate Court's "liberal" analysis in this case is illustrative of the fact that "the hearsay rule is applied more liberally than it is written" (Lampert & Saltzburg, *A Modern Approach to Evidence*, 519 (2d ed. 1982)), especially in child abuse cases. *See State v. Myatt*, 237 Kan. 17, 23, 697 P.2d 836, 842 (1985) (noting that courts have "tended to stretch existing hearsay exceptions" in child abuse cases). For example, in *Goldade v. State*, 674 P.2d 721, 725 (Wyo. 1983), the court admitted hearsay statements against the defendant in a child abuse prosecution, stating:

> If the goal of our court were simply to pursue the common-law tradition of *stare decisis*, then the cited authorities must be recognized as supporting the position of the appellant [to exclude the statement]. In this instance, however, the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse.

Significantly, the liberal application of hearsay exemptions in child abuse prosecutions eviscerates the traditional rationale for exempting the out-of-court statements

from the hearsay rule. Under these circumstances, a judicial determination that an out-of-court statement falls within an exception to the hearsay rule is no guarantee that the statement is either reliable, trustworthy, or accurate.

C. Respondent Overstates the Burdens Associated with the Unavailability Requirement.

Respondent argues that the unavailability requirement imposes "significant burdens on the prosecution and the criminal justice system." (State's Brief at 18) However, the burdens referred to by Respondent are either overstated or non-existent.

1. *The Unavailability Requirement Is Perfectly Compatible with the Federal Rules of Evidence.*

Respondent argues that the unavailability requirement renders "all of the federal and state hearsay exceptions, as well as their common-law antecedents," unconstitutional. (State's Brief at 27) However, this concern is unwarranted since the Confrontation Clause and the Federal Rules of Evidence are perfectly compatible.

The introductory wording of Federal Rule of Evidence 803 does not state that an exception listed therein is admissible, but merely that it is "not excluded by the hearsay rule." The Advisory Committee's Note explains:

> In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.
>
> Fed.R.Evid., art. VIII, Advisory Committee Note.

Accordingly, the Federal Rules of Evidence specifically recognize that "*the impact of the* [*confrontation*] *clause clearly extends beyond the confines of the hearsay rule.*" Fed.R.Evid., art. VIII, Advisory Committee Note; emphasis added.

The unavailability doctrine is compatible with state and common law hearsay exceptions as well. The criminal justice system recognizes the separateness of the Confrontation Clause and the hearsay rule. Unlike civil litigation, the procedure for admitting hearsay assertions in a criminal prosecution involves a two-step analysis. First, it must be asked if the assertion comes within an exception to the hearsay rule. If the answer is yes, then it must be determined whether the admission of that assertion violates the defendant's constitutional right to confront the witnesses against him. *Hearsay Handbook*, § 6.06 at 78.

Respondent's argument overlooks the fact that exceptions to the hearsay rule, whether statutory or common law, normally encompass both civil and criminal proceedings. Thus, a two-step inquiry is necessary in criminal proceedings to ensure that a defendant's constitutional rights are protected.

2. *The Unavailability Requirement Does Not Apply to Every Hearsay Exception.*

Respondent argues that the application of the unavailability requirement to "all of the federal and state hearsay exceptions . . . would place considerable burdens on the prosecution and the criminal justice system." (State's Brief at 27) However, the unavailability requirement does not apply to *all* hearsay exceptions.

In *Ohio v. Roberts*, 448 U.S. 56, 65 n.7 (1980), the Court held that unavailability is not required where the "utility of confrontation" is remote. Accordingly, the unavailability requirement is not applicable to many of the exceptions recognized by Federal Rule of Evidence 803, *e.g.*, business records, market reports, learned treatises, and other regularly maintained forms of evidence.

Given the nature of the hearsay offered under these exceptions, the utility of trial confrontation is likely to be remote.[1]

In fact, this is one reason that co-conspirator statements were exempted from the unavailability requirement in *United States v. Inadi*, 475 U.S. 387 (1985). The Court concluded that the utility of confrontation was remote since the co-conspirator declarant was considered so unimportant that neither side had subpoenaed him.

The same cannot be said about the prosecution's complaining witness in the present case who was the only witness to the alleged crime and whose out-of-court statements constituted the bulk of the prosecution's case against the accused.

3. The Unavailability Rule Does Not Impose a Significant Burden on the Appellate Courts Which Already Deal with the Unavailability Requirement on a Regular Basis.

Respondent argues that the unavailability requirement places a substantial burden on the appellate courts. (State's Brief at 21) However, the appellate courts, and trial courts as well, already deal with the unavailability requirement on a regular basis. For instance, evidence law already imposes an unavailability requirement for a number of hearsay exceptions. *See* Fed.R.Evid. 803. Moreover, child hearsay statutes in many states, including Illinois (Ill.Rev.Stat., 1987, Ch. 383, § 115-10), impose unavailability requirements. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv.L.Rev. 806, 812 (1985)

[1] It has been suggested that the unavailability requirement was intended to apply to the first four exceptions (*e.g.*, present sentence impression, excited utterance, existing mental, physical, or emotional condition, and statements made for medical treatment), as well as the residual exception. Fed.R.Evid. 803(1)-(4), (24). Kirkpatrick, *Confrontation & Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 Minn.L.Rev. 655 n.132 (1986).

(citing statutes). Under these circumstances, the constitutional unavailability requirement causes little additional work.

4. The Burden on the Prosecution to Identify, Locate, and Produce Its Complaining Witness Is Not Insuperable.

This Court has held the application of the unavailability rule to co-conspirator hearsay would impose a significant burden by requiring the prosecution "to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial." *United States v. Inadi*, 475 U.S. at 399. Since co-conspirators are often incarcerated, the requirement of producing them at trial burdens prison officials and creates the risk of escape.

Obviously, the foregoing reasoning has limited application here. The prosecution should have little difficulty identifying and locating its own complaining witness.

Nevertheless, Respondent argues that the prosecution should not be burdened with ensuring the complainant's continuing availability for trial, reasoning that the child's emotional condition may prevent her from testifying. (State's Brief at 21) This reasoning is obviously flawed since if the child is incapable of testifying, she need not be produced as a witness. As this Court has stated, "the prosecution must *either produce or demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant." *Idaho v. Wright*, 111 L.Ed.2d at 651-52, quoting *Ohio v. Roberts*, 448 U.S. at 65-66 (emphasis added).

D. Respondent's Attempt to Shift the Burden of Production to the Defendant Violates the Sixth Amendment and Undermines the Truth-Seeking Process.

Since the proponent of evidence carries the burden of "establishing [the] predicate" for its introduction, the

burden is on the prosecution to either "produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S. at 75. Respondent argues that this burden should be shifted to the defense, reasoning that the defendant should be required to subpoena the complaining witness and obtain her testimony under the Compulsory Process Clause. (State's Brief at 19) However, Respondent fails to explain how this procedure would further "the state's interest in preventing trauma to child witnesses in such cases . . ." (State's Brief at 24) Moreover, Respondent's proposal violates the Sixth Amendment and would subvert the truth-seeking process.

1. *Respondent Confuses the Compulsory Process Clause with the Confrontation Clause.*

Respondent's reasoning erroneously equates the right of confrontation with the right to compulsory process. The two are not the same. The Sixth Amendment guarantees the accused two distinct rights: confrontation *and* compulsory process. The defendant is guaranteed "compulsory process *for obtaining witnesses in his favor.*" The defendant is also given the right *"to be confronted with the witnesses against him."* Thus, Respondent's attempt to merge the two clauses sets the Sixth Amendment into conflict with itself.

Respondent points to *Inadi* where this Court held that the "defendant himself can call and cross-examine" his co-conspirator. *United States v. Inadi*, 475 U.S. at 399. However, *Inadi*'s logic is inapplicable here because the relationship between the accused and his accuser is entirely different from the relationship between co-conspirators.

By definition, statements admitted under the co-conspirator exception were made while the conspiracy was in progress, at a time when the co-conspirator was a cohort of the defendant. Accordingly, an absent co-

conspirator cannot be considered a "witness against the accused" simply because co-conspiratory hearsay is admitted at trial.

Unlike the co-conspirator, however, the complainant in a criminal case is, by definition, a witness against the accused.[2] Unlike co-conspirator hearsay, the complainant's out-of-court statements are accusatory in nature.[3] Thus, unlike the co-conspirator, it can hardly be said that the prosecution's complaining witness is a witness favorable to the defendant within the meaning of the Confrontation Clause, especially in the present case where the complainant's out-of-court accusations constituted the bulk of the evidence against the accused.

2. *Respondent's Burden-Shifting Proposal Violates the Sixth Amendment by Subverting the Defendant's Right to the Orderly Introduction of Evidence.*

The right to the "orderly introduction of evidence" is implicit in the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 818 (1975). Respondent's burden-shifting proposal subverts this constitutional right by allowing the prosecution to substitute belated for timely cross-examination. The proposed procedure allows the prosecution to introduce the complainant's testimony via hearsay witnesses, while requiring the defendant to wait until his case-in-chief to cross-examine the declarant.

It has been recognized that the right to cross-examine a prosecution's witness immediately following the conclu-

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[2] *"Complainant* . . . one who instigates prosecution or who prefers accusation against suspected person." Black's Law Dictionary (5th ed. 1979).

[3] It has been suggested that the phrase "witness against" a defendant be limited to those witnesses who testify in court on behalf of the prosecution or whose out-of-court statements are "accusatory" in nature. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse: The State of the Relationship*, 72 Minn.L.Rev. 523, 585 (1988).

sion of his direct examination is at the heart of the Confrontation Clause:

> The gross order-of-proof in American criminal procedure is dictated partly by tradition and partly by constitutional compulsion. Thus, tradition provides that as between two sides, the prosecution presents its case first and the defendant presents his case second. In addition, however the sixth amendment entitles a defendant to interrupt the prosecution's case-in-chief by intervening to elicit evidence in his defense by means of cross-examination. . . . Indeed, *the right of a defendant to interrupt the state's presentation of evidence by cross-examining prosecution witnesses is at the core of the sixth amendment right of confrontation.*
>
> Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 Calif.L.Rev. 934, 981-83 (1978), (emphasis added).

Accordingly, it has been noted that "only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of the right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *United States v. Inadi*, 475 U.S. at 410 (Marshall, J., dissenting), quoting *New York Life Ins. Co. v. Taylor*, 79 App.D.C. 66, 74, 147 F.2d 297, 305 (1945).

Significantly, this Court has never hinted, even slightly, that the Sixth Amendment permits the prosecution to introduce an *ex parte* affidavit or a video statement of the complaining witness merely because the accused may later call and examine the complainant during his case-in-chief. There is no valid reason to permit such a burden-shifting procedure when the prosecution relies upon the complainant's unsworn verbal hearsay rather than written affidavits or closed-circuit testimony.

3. *Respondent's Burden-Shifting Proposal Subverts the Truth-Seeking Process.*

In *Inadi*, the Court concluded that the application of the unavailability requirement to co-conspirator hearsay would add little to the "truth-determining process," since "only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses." *United States v. Inadi*, 475 U.S. *at* 396-97. Respondent attempts to extend *Inadi*'s logic to this case by noting that the prosecutor might decide "not to call" the complaining witness. (State's Brief at 19)

However, Respondent's logic again overlooks the critical distinction between co-conspirators and complaining witnesses. Since the co-conspirator is often facing indictment himself, he "has little incentive to aid the prosecution" and will have a motive to testify falsely. *United States v. Inadi*, 475 U.S. at 396. Under those circumstances, the unavailability requirement adds little to the truth-seeking process.

The same cannot be said when the prosecution declines to call the only witness to the alleged crime, simply because the prosecutor determines that the complainant's testimony will not be "particularly helpful." Absent the unavailability requirement, the prosecution can build a case on hearsay without encountering any of the risks of calling the complaining witness to the stand. Such a procedure subverts the truth-seeking process by allowing the prosecution to rely on witnesses who know nothing except what the absent declarant said, thereby eliminating the incentive for the prosecutor to make the fullest presentation of evidence. As one commentator has noted:

> [T]he purpose of the [unavailability] rule is to force the prosecutor to put forward the best case he has against the defendant. There is something innately unfair and reminiscent of trial by affidavit in a process that allows the prosecutor to build a case with hearsay, while the defendant is forced to scramble

about and exhaust his own, often scarce resources to attempt to produce the declarants.

Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv.L.Rev. 1378, 1403 (1972).

Certainly, the truth-determining process is better served by requiring the prosecution to present all, not just part, of the relevant evidence.

If the prosecution's proposal is implemented, the jury may often be deprived of the most significant evidence in the case: the testimony of the only eyewitness to the crime. For instance, after interviewing the complaining witness the prosecutor might conclude that the complainant's testimony could actually damage the prosecution's case against the accused. Accordingly, the prosecutor may elect not to call the complainant to the stand, thereby shifting the burden of production to the defendant. However, in criminal cases, especially child abuse prosecutions, the defense often has not had the opportunity to interview the complaining witness prior to trial. Time-worn admonitions tell the advocate not to call someone without knowing what she will say. Moreover, the defense risks angering the jury by calling the child, especially under circumstances like the present case where the complainant appears before the jury emotionally distraught.

In such a situation, the complaining witness might not be called to the stand. Common sense, however, dictates that the testimony of the only eyewitness would have aided the jury and advanced the truth-seeking process.

E. The Prosecution Failed to Establish that the Complaining Witness Was Unavailable to Testify at Trial.

The defendant agrees with Respondent's premise that "a child witness who is physically present is nevertheless 'unavailable' for confrontation purposes if psychologically able to testify." (State's Brief at 29) However, the defendant challenges Respondent's conclusion that a sufficient showing of unavailability was made in this case where "S.G. was *apparently* so emotionally distraught by the time she was called to testify that she could not take the stand . . ." (State's Brief at 27; emphasis added).

This Court has held that the requisite finding of unavailability must be "a case-specific one," based upon evidence presented at a hearing. *Maryland v. Craig*, 111 L.Ed.2d at 685. The trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. *Maryland v. Craig*, 111 L.Ed.2d at 685. Finally, the trial court must find that "the emotional distress suffered by the child is more than *de minimus*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" *Maryland v. Craig*, 111 L.Ed.2d at 685. Accordingly, in *Coy v. Iowa*, 487 U.S. 1012 (1988), this Court held that the right of face-to-face confrontation could certainly not be denied where no individualized findings had been made that the witness needed special protection.

In this case, the record does not reveal whether the "*apparent*" distress suffered by the child was the result of reluctance to testify, nervousness, excitement, the courtroom generally, or the presence of the defendant. Furthermore, there was no hearing on the issue of unavailability and there were no findings by the trial court.

Finally, Respondent suggests that if the record fails to establish that S.G. was unavailable to testify, the prosecution should be given an opportunity to make such a showing on remand before petitioner is granted a new trial.[4] (State's Brief at 30) However, Respondent's

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[4] Respondent fails to explain how such a showing could be made. The defendant's trial occurred over three years ago. Even if it can be shown that S.G. is unavailable to testify now, it would not necessarily mean that she would have been unavailable to testify at trial.

argument overlooks the fact that the prosecution not only had the opportunity, but the obligation, to establish S.G.'s unavailability *prior* to the introduction of the hearsay testimony. *Ohio v. Roberts*, 448 U.S. at 65.

Significantly, in light of the age of the child and nature of the proceedings, it is not unreasonable to suggest that the prosecutor should have known that S.G.'s debut as a witness could be an emotionally trying experience.[5] Yet, the prosecutor did not seek a pretrial ruling concerning unavailability, nor did he move for the closed-circuit viewing of the child's testimony pursuant to the applicable provisions of the Illinois Code of Criminal Procedure (Ill.Rev.Stat., 1987, Ch. 38, § 106A-3).

In fact, the prosecutor did not attempt to call S.G. to the witness stand until *after* her out-of-court statements had already been introduced through the testimony of five different witnesses. By waiting to call S.G. until the conclusion of his case-in-chief, the prosecutor may have been hoping to gain some strategic advantage. However, since the Confrontation Clause requires a showing of unavailability as a *precondition* to the admission of hearsay statements by a non-testifying declarant, the prosecutor risked inducing a mistrial if the complainant did not testify.

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[5] In fact, prior to calling S.G. to the stand, the prosecutor moved for the exclusion of spectators, recognizing that it "is incredibly difficult for anyone even an adult to testify about acts such as are alleged here and for the child this is doubly more so." (J.A. 7).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petitioner's Brief, it is respectfully requested that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand this cause for a new trial.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

RANDALL D. WHITE, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FOURTH JUDICIAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

During petitioner's trial on charges arising from a sexual assault, the State introduced evidence of out-of-court statements by the victim that were admissible under hearsay exceptions for spontaneous declarations and for statements made to medical personnel for purposes of medical treatment. The question presented is whether the Confrontation Clause required the State to demonstrate that the victim was unavailable to testify at trial before the victim's out-of-court statements would be admissible.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6113

RANDALL D. WHITE, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Under Fed. R. Evid. 803(2) and 803(4), evidence of excited utterances and statements to medical personnel for purposes of medical treatment are admissible regardless of whether the declarant is available to testify. This case presents the question whether the Confrontation Clause allows the introduction of such statements if the declarant is available but does not testify at trial. The Court's answer to that question will govern the use of those types of statements in both state and federal prosecutions, and it may also affect a number of other hearsay exceptions recognized by the Federal Rules of Evidence.

STATEMENT

1. During the early morning hours of April 16, 1988, Tony DeVore was babysitting for S.G., a four-year-old

girl, and S.G.'s three-year-old brother. After putting the children to bed in their mother's bedroom, DeVore fell asleep on a couch downstairs. At around 4 a.m., DeVore was awakened by S.G.'s scream. DeVore went upstairs and saw petitioner, whom she had met, leave the bedroom. Petitioner told DeVore that S.G. "woke up screaming." Petitioner then left the house. S.G. was crying when DeVore reached the bedroom. DeVore testified that when she asked S.G. what had happened, S.G. replied that "Randy" had put his hand over her mouth, choked her, threatened to whip her and to have DeVore whip her if she screamed, and touched her in her "private places"—*i.e.*, the vaginal area. (Petitioner and S.G.'s mother had dated one another, and S.G. had met petitioner.) J.A. 19-21; VI R. 11-12, 15-17, 24, 89.[1]

S.G.'s mother, Tammy Grigsby, arrived home shortly thereafter. After speaking briefly with DeVore, Grigsby asked S.G., who appeared scared and "a little hyper," what had happened. According to Grigsby's trial testimony. S.G. replied that "she woke up and that Randy was in the room. And that he put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony [DeVore] would whip her too. And then she said that he put his mouth on her front part." J.A. 21-22; VI R. 77-80.

Grigsby called the police. and Officer Terry Lewis arrived at 4:47 a.m. When Lewis spoke with her, S.G. seemed upset, nervous, and uneasy, but was cooperative. In response to Lewis's questions, S.G. provided a description of the incident that was essentially identical to her statements to DeVore and Grigsby, except that S.G. told Lewis that Randy had gotten her underpants wet by "pull[ing] her pants to one side and us[ing] his tongue on her private parts, what she called her private parts." J.A. 22-23; VI R. 109-112.

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[1] Citations to "VI R." and "VII R." refer to the two-volume trial transcript.

At 8 a.m. the same morning, S.G. was taken to a hospital emergency room. An emergency room nurse, Cheryl Reents, spoke with S.G. in order to obtain a history to assist in S.G.'s treatment and diagnosis. In response to Reents' questions regarding whether she had been touched anywhere other than her mouth and neck, S.G. replied that she had been touched on her "front part" by Randy's mouth. Similarly, S.G. told Dr. Michael Meinzen, the physician on duty at the emergency room, that "Randy" had "put his hands over her mouth and on her neck" and had "put his mouth down there," pointing in the direction of her genitalia. J.A. 24-26; VI R. 47-51; VII R. 8-12.

At petitioner's trial, DeVore, Grigsby, Lewis, Reents, and Meinzen were permitted, over petitioner's objections, to testify regarding S.G.'s statements. The State made two attempts to call S.G. as a witness, but she experienced "emotional difficulty" when she was brought to the courtroom and left without testifying. J.A. 14; see *id.* at 12-15; VI R. 106-107, 122-123; VII R. 2-5. Petitioner made no effort to call S.G. to the stand, and the trial court was not asked by either party to determine whether she was legally available to testify. See VI R. 105-106.

2. The Appellate Court of Illinois, Fourth Judicial Circuit, affirmed the convictions. The court held that S.G.'s statements to DeVore, Grigsby, and Officer Lewis were admissible under the State's exception to the hearsay rule for "spontaneous declarations." Under Illinois law, that exception authorizes admission of "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." J.A. 27; see *id.* at 33-36. Similarly, the court found that S.G.'s statements to nurse Reents and Dr. Meinzen were admissible under a state statute providing for the admission of "statements made by the victim [of specified offenses] to medical personnel for purposes of medical diagnosis or treatment." J.A. 37-39.

The appellate court rejected petitioner's contention that the Confrontation Clause prohibited the admission of S.G.'s statements because she was not shown to be unavailable to testify. Following this Court's decision in *United States* v. *Inadi*, 475 U.S. 387, 391-394 (1986), the state court held that with respect to most types of hearsay, "[w]hether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule." J.A. 42.

SUMMARY OF ARGUMENT

S.G.'s out-of-court statements were admitted under two well-recognized exceptions to the hearsay rule: the exception for excited utterances, and the exception for statements made to medical personnel for purposes of diagnosis or treatment. The rules of evidence in Illinois, as in the federal courts and other American jurisdictions, provide that out-of-court statements are admissible under those exceptions regardless of whether the declarant is available to testify. We submit that the Confrontation Clause does not override those well-settled hearsay exceptions and require that such statements be excluded unless the declarant testifies or is shown to be unavailable.

I. In *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), this Court stated that "the prosecution must either produce, or demonstrate the unavailability of, the declarant" in order to introduce evidence of an out-of-court statement. Although *Roberts* characterized that principle as a general one, the Court in *United States* v. *Inadi*, 475 U.S. 387, 392-394 (1986), made clear that the quoted language from *Roberts* was intended to apply only to prior testimony, the kind of evidence at issue in that case.

Inadi set forth two reasons why a requirement of unavailability should not be extended to all hearsay exceptions. Both reasons are applicable to the statements at issue here. First, some hearsay declarations are made

under circumstances that make them highly probative in their own right, without regard to what the declarant might say as a witness at trial. Like the co-conspirator declarations at issue in *Inadi*, the victim's statements in this case were not merely a less desirable substitute for in-court testimony, but carried special guarantees of reliability derived from the setting in which they were made. S.G.'s statements to her babysitter, her mother, and Officer Lewis were made when the assault was foremost in her mind and while she was still under the emotional effect of the incident. Under those circumstances, a declarant is unlikely to have suffered loss of memory about the events or to have had sufficient opportunity to fabricate a false account of it. Similarly, S.G.'s statements to the nurse and doctor in the emergency room were likely to be reliable because they were made shortly after the event and for the purpose of obtaining medical treatment. In that setting, a declarant typically perceives that it is important to give a careful and accurate account of the events that led to the need for medical treatment, and the risk of fabrication or careless recounting is therefore minimized.

Second, the burdens and benefits associated with petitioner's position weigh heavily against it. A requirement that the prosecutor produce the declarant or demonstrate the declarant's unavailability as a condition of introducing the declarant's out-of-court statements into evidence would impose a purposeless burden on prosecutors and the courts. To preserve their ability to introduce out-of-court statements, prosecutors would have to produce—or demonstrate the unavailability of—even those declarants whom neither side wishes to examine. Courts would be called upon to resolve inevitable disputes over whether declarants were truly unavailable. That burden is unnecessary to protect defendants, who may exercise their right to compulsory process to secure the presence of any available witnesses they actually wish to examine.

II. More fundamentally, S.G. was not a "witness against" petitioner within the meaning of the Confrontation Clause. That term should be reserved, in accordance with its ordinary meaning, for live witnesses and those declarants whose prior testimony, affidavits, confessions, or other similar statements are made in the course of or in anticipation of litigation. Statements made without a view to pending or anticipated legal proceedings do not constitute testimony by a "witness."

The history of the Confrontation Clause does not support the view that all hearsay declarants are "witnesses." The common-law right to confrontation, which was incorporated in the Bill of Rights, arose in response to the once-common English practice of using depositions, affidavits, and other similar statements in lieu of live testimony in criminal trials. There is no indication in the historical materials that the common-law confrontation right was meant as a general limitation on the development of the hearsay rule and its exceptions.

For nearly 200 years, the hearsay rule and its exceptions evolved in this country without any suggestion by this Court that all persons who make out-of-court statements that are later introduced into evidence are "witnesses against" a defendant. Most of this Court's Confrontation Clause cases, like *Ohio* v. *Roberts*, involved prior testimony or its functional equivalent. With regard to such statements, it is historically accurate to say that the declarants serve as "witnesses against" the defendant. It was therefore proper for the Court to require the prosecution to produce the declarant or establish his unavailability as a precondition to introducing his out-of-court statement. But the historical concerns addressed by the Confrontation Clause do not justify extending that requirement to all out-of-court statements. A declarant who makes a statement for reasons unrelated to pending or anticipated litigation is not a "witness against" the defendant even if the statement is ultimately used to aid in the defendant's prosecution. State-

ments of that kind, including the statements at issue in this case, are therefore properly regulated by the rules of hearsay, not by the Confrontation Clause.

ARGUMENT

I. THE CONFRONTATION CLAUSE DID NOT REQUIRE THE STATE TO SHOW THAT S.G. WAS UNAVAILABLE BEFORE HER OUT-OF-COURT STATEMENTS COULD BE ADMITTED INTO EVIDENCE

A. A Showing of Unavailability Is Not A General Precondition For The Admission Of All Out-Of-Court Declarations Offered Against A Criminal Defendant

Petitioner contends that the Confrontation Clause establishes a "rule of necessity" under which a declarant's out-of-court statements are inadmissible unless the declarant is shown to be unavailable to testify at trial. As support for that view, petitioner relies primarily on *Ohio* v. *Roberts*, 448 U.S. 56 (1980). In *Roberts*, the Court observed that "[i]n the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.[2] As the Illi-

[2] It is unclear whether petitioner is arguing for a rule that would exclude out-of-court statements unless the prosecution either produced the declarant or demonstrated the declarant's unavailability (the principle articulated in *Roberts*) or the broader rule that would permit the admission of out-of-court statements only if the prosecution could demonstrate the unavailability of the declarant, *i.e.*, a rule that would exclude out-of-court statements even if the declarant was produced at trial and testified as a witness. See Pet. Br. 12-14. In any event, the broader rule has been squarely rejected by this Court. See *United States* v. *Inadi*, 475 U.S. 387, 392 (1986) ("if the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway"); *California* v. *Green*, 399 U.S. 149, 153-164 (1970); see also *United States* v. *Owens*, 484 U.S. 554, 560 (1988) (no need to show "indicia of

nois Appellate Court recognized, however, that principle cannot be extended to all out-of-court statements. In particular, it does not apply to out-of-court statements of the sort at issue in this case.

Roberts itself noted that "[a] demonstration of unavailability * * * is not always required." 448 U.S. at 65 n.7. Moreover, in *United States* v. *Inadi*, 475 U.S. at 392, the Court rejected the argument that under *Roberts* "no out-of-court statement would be admissible without a showing of unavailability." To interpret the Confrontation Clause to require a showing of unavailability as a prerequisite to the admission of any out-of-court statement would render unconstitutional many of the hearsay exceptions long recognized in both federal and state law, since most exceptions to the hearsay rules do not require that the declarant be shown to be unavailable. See, *e.g.*, Fed. R. Evid. 801(d), 803. The Court in *Inadi* made it clear that *Roberts* "does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause." 475 U.S. at 392. Rather, the Court held the principle of *Roberts* to apply only to prior testimony, a kind of hearsay for which a showing of unavailability has traditionally been required under both the Confrontation Clause and the rules of evidence. The Court explained (475 U.S. at 394):

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule * * * that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

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reliability" of out-of-court statements when a hearsay declarant "is present at trial and subjected to unrestricted cross-examination" regarding those statements).

Inadi identified the considerations that distinguish prior testimony from other types of hearsay for purposes of the unavailability requirement. In *Inadi*, the government introduced evidence of out-of-court statements by several members of a drug conspiracy as substantive evidence against a defendant charged with participation in the scheme. The statements were admitted under the co-conspirator exception to the hearsay rule, which does not require a showing that a declarant is unavailable to testify at trial. See Fed. R. Evid. 801(d)(2)(E). Relying on *Roberts*, the Third Circuit held that the Confrontation Clause prohibited the introduction of a co-conspirator's otherwise admissible statements unless the prosecution either produced the co-conspirator to testify or demonstrated his unavailability. This Court reversed, holding that the unavailability rule, "developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements." 475 U.S. at 394.

The Court noted that there is a fundamental difference between prior testimony and co-conspirator statements with respect to their evidentiary significance. Former testimony, the Court explained, "is only a weaker substitute for live testimony." 475 U.S. at 394. For that reason, "[i]f the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." *Ibid.* By contrast, the Court continued, statements by co-conspirators in furtherance of a conspiracy "are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 395-396. The Court explained (*id.* at 395):

> Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. * * * Conspirators are likely to speak differently

> when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

In addition, the *Inadi* Court determined that there is "little, if any, benefit to be accomplished by the * * * unavailability rule" adopted by the court of appeals in that case. 475 U.S. at 396. The rule would not serve to enhance the quality of the evidence introduced during a trial, the Court pointed out, "because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness." *Ibid.* In view of the defendant's right to compel the attendance of any available witness, the Court continued, "it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.'" *Id.* at 398. The Court also noted that the task of producing or demonstrating the unavailability of each co-conspirator declarant, whether or not either party wished to elicit his testimony, would "place[] a significant practical burden on the prosecution." *Id.* at 399. The Court concluded that "[a]ny marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule." *Id.* at 399-400.

B. The Rationale Of The Unavailability Requirement Does Not Apply To The Hearsay Exceptions At Issue In This Case

The Court's reasoning in *Inadi* is equally applicable to the hearsay exceptions at issue in this case. S.G.'s out-of-court statements were admitted precisely because they

had the same kind of special probative value as the co-conspirator statements at issue in *Inadi*. Moreover, extension of the unavailability requirement to the hearsay exceptions at issue here would impose the same burdens on the administration of criminal justice that the Court identified in *Inadi*.

The law of evidence recognizes that in-court testimony is not always preferable as evidence to out-of-court statements. In-court testimony is usually given long after the event, at a time when the legal consequences of the testimony are plainly in view. As a result, witnesses who have an interest in the outcome of the case have both the opportunity and the incentive to shape their testimony accordingly. Similarly, disinterested witnesses are exposed to attempts by parties to influence their recollections and testimony. Courtroom procedures—an oath, the witness's face-to-face encounter with the jury and the parties, and cross-examination—serve to counter, but cannot eliminate, those features of live testimony.

A number of hearsay exceptions, including those at issue in *Inadi* and in this case, recognize that out-of-court statements made without a view to pending or anticipated litigation, in settings that tend to assure their reliability, have special probative value. Those statements are admitted even though they have not been subjected to the safeguards devised for in-court testimony. Because such evidence has different sources of reliability than the procedural safeguards that surround live testimony, it is admitted even if the declarant is available to testify at trial.

The theory underlying these exceptions, which "finds vast support in the many exceptions to the hearsay rule developed by the common law," is that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person." Fed. R. Evid. 803 Advisory Committee Note, 28 U.S.C. App. at 777. Congress has subscribed to that view through its

enactment of the Federal Rules of Evidence and the Business Records Act, 28 U.S.C. 1732.

By contrast, the principal justification for receiving prior testimony, the form of hearsay at issue in *Roberts*, is necessity. Like live testimony, prior testimony is given with a view to its legal consequences, but it is inferior to live testimony in at least two respects. The jury is denied the opportunity to examine the witness's demeanor, and the prior testimony may not have been given at a point when the parties had an interest in fully developing the witness's testimony for purposes of the trial. Thus, if a witness is available to testify at trial, there is little justification for admitting prior testimony in lieu of live testimony. *Inadi*, 475 U.S. at 394. See generally 5 J. Wigmore, *Evidence* §§ 1420-1421 (Chadbourne rev. 1974).

1. The hearsay exception for "spontaneous declarations"—under which S.G.'s statements to her babysitter, her mother, and Officer Lewis were admitted into evidence—has the same basic justification as the exception for co-conspirator statements. Excited utterances are admissible because "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Fed. R. Evid. 803 Advisory Committee Note, 28 U.S.C. App. at 778; 6 J. Wigmore, *supra*, § 1747, at 195; E. Cleary, *McCormick on Evidence* § 297 (3d ed. 1984) [hereinafter *McCormick on Evidence*].[3] Statements made under the influence of a startling event, like statements made by co-conspirators in furtherance of a

[3] Consistent with the rationale of the exception, excited utterances are not admissible unless they result from an event "sufficiently startling to render inoperative the normal reflective thought processes of an observer," *McCormick on Evidence* § 297, at 854, and "[t]he utterance must have been made before there has been time to contrive and misrepresent," 6 J. Wigmore, *supra*, § 1750, at 202. The state court rejected petitioner's argument that S.G.'s statements to her mother and Officer Lewis did not satisfy the second requirement of the exception. See J.A. 33-36.

conspiracy, are thus unlikely to be influenced by the declarant's calculation of their effect on a future trial. See *Idaho* v. *Wright*, 110 S. Ct. 3139, 3149 (1990). Moreover, they are made within a short time of the pertinent events, which reduces the risk of inaccurate reporting due to loss of memory. For these reasons, the law of evidence in the federal courts, Illinois, and other American jurisdictions excludes excited utterances from the general prohibition on the use of out-of-court statements as substantive evidence.[4]

For the same reason, excited utterances are admissible without regard to whether the declarant is available to testify at trial. The excitement resulting from a startling event "justif[ies] dispensing with any requirement that the declarant be unavailable, because it suggests that his testimony on the stand, given at a time when his powers of reflection and fabrication are operative, is at least no more reliable than his out-of-court statement." *McCormick on Evidence* § 297, at 855. To paraphrase *Inadi*, because excited utterances are made nearly simultaneously with the relevant event, under circumstances that suppress the declarant's capacity to engage in conscious falsification, they "provide evidence * * * that can-

[4] The exception for excited utterances is one of the oldest exceptions to the hearsay rule, having emerged before the end of the 18th century. 6 J. Wigmore, *supra*, § 1747, at 195; see *Thompson* v. *Trevanion*, 90 Eng. Rep. 179 (1693) (admitting evidence of statement by injured woman "immediate upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage"). The exception grew out of the principle that statements constituting part of the *res gestae* of an event are admissible. See, *e.g.*, *Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397, 405-408 (1869); *Snowden* v. *United States*, 2 App. D.C. 89, 93-97 (1893); *Commonwealth* v. *Hackett*, 84 Mass. (2 Allen) 136, 139-140 (1861); *Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181, 184 (1849). The exception is very widely recognized, see 6 J. Wigmore, *supra*, § 1750, at 204-221 n.3; 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 802(2)[2] (1990 & Supp. April 1991), and it has been regarded as a "firmly rooted" hearsay exception. *E.g.*, *Puleio* v. *Vose*, 830 F.2d 1197, 1206 (1st Cir. 1987) (citing cases).

not be replicated, even if the declarant testifies to the same matter in court." 475 U.S. at 395.[5]

2. The same reasoning applies to statements made to medical personnel for purposes of medical diagnosis or treatment—the exception authorizing the admission of S.G.'s statements to her nurse and doctor. The justification for admitting such statements is that persons seeking medical attention have special incentives, distinctly different from those motivating in-court witnesses, to speak truthfully with respect to matters pertinent to their treatment. The reliability of such statements is "assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician." *McCormick on Evidence* § 292, at 839; see *Idaho* v. *Wright*, 110 S. Ct. at 3149.[6] In keeping

[5] In addition to the Illinois Court of Appeals in this case, other state courts have held that no constitutional unavailability requirement limits the admissibility of excited utterances. *People* v. *Hughey*, 194 Cal. App. 3d 1383, 240 Cal. Rptr. 269 (1987); *State* v. *Palomo*, 113 Wash. 2d 789, 783 P.2d 575 (1989), cert. denied, 111 S. Ct. 80 (1990). See also *Ferrier* v. *Duckworth*, 902 F.2d 545 (7th Cir.), cert. denied, 111 S. Ct. 526 (1990).

[6] Statements regarding physical pain have been received in evidence since the 17th century, when the hearsay rule itself emerged. 6 J. Wigmore, *supra*, § 1718, at 101 & n.1. See *Barber* v. *Merriam*, 93 Mass. (11 Allen) 322, 324-326 (1865); *Howe* v. *Plainfield*, 41 N.H. 135, 136 (1860); *Aveson* v. *Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805). The hearsay exception for statements to medical personnel is very widely recognized. See *McCormick on Evidence* § 292, at 839-840; 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(4)[2] (1990 & April 1991 Supp.).

The justification for this hearsay exception is fully applicable to children, as long as their statements are made for the purpose of medical treatment or diagnosis. *Morgan* v. *Foretich*, 846 F.2d 941, 949-950 (4th Cir. 1988) (citing cases). Indeed, in some instances, a child's motivation to speak truthfully to a doctor may be even stronger than that of an adult. See *id.* at 949; *United States* v. *Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

with that rationale, such statements are admitted regardless of whether the declarant is available. As in the case of excited utterances, the special reliability of statements made to medical personnel for diagnosis and treatment justifies dispensing with the requirement of a showing that the declarant is unavailable to testify at trial, since the out-of-court statement may well have greater probative value than testimony given by the declarant from the witness stand.

3. Contrary to petitioner's contention (Br. 26-28), the Confrontation Clause does not justify distinguishing between statements by a co-conspirator and those of a "complaining witness," on the theory that a co-conspirator is less likely to seek to incriminate the future defendant. S.G.'s statements were admissible in this case precisely because they were unlikely to be influenced by the motivations characteristic of a "complaining witness"—*i.e.*, a person who has consciously invoked the aid of the police and the criminal justice system by accusing an individual of a crime. There are differences between a frightened child, a patient seeking treatment, and a co-conspirator seeking to advance a criminal enterprise. In terms of the evidentiary significance of their out-of-court statements, however, they all fall on the same side of the line that *Inadi* drew between testimonial declarations and statements made for other purposes. All three statements are made under conditions that give them special probative value and distinguish them from live testimony or the accusations characteristic of a "complaining witness."

4. As in *Inadi*, the rule petitioner advocates would impose severe burdens on the criminal justice system without providing any significant benefit to defendants. Requiring the production of the declarant or proof of the declarant's unavailability in this setting would saddle the prosecution with the task of producing witnesses neither side wishes to examine, without enhancing the defendant's access to any witnesses he could not secure through his own efforts. In this case, for example, there

is not the slightest doubt that the State could have either produced the declarant or established that she was legally unavailable to testify. In fact, at one point S.G. was physically present in the courtroom. Whether or not she was legally available to testify, then, her statements would have been admissible even if an "unavailability" requirement were extended to a case such as this one.

It is equally clear that the absence of an unavailability requirement did not unfairly disadvantage petitioner. If he had wanted to examine S.G., he could have subpoenaed her to testify, and the trial court would then have determined S.G.'s legal availability. Petitioner made no attempt to obtain live testimony from S.G. Indeed, there is no indication that petitioner argued in the trial court, as he did on appeal, that the State was required to produce S.G. for examination. The record thus justifies the inference that the defense saw more advantage in the preservation of a legal argument based on *Roberts* than it did in the opportunity to question S.G. in the presence of the jury.

The effect of an unavailability requirement is to require the prosecution to produce each hearsay declarant whose statement it wishes to introduce—on pain of losing the evidence—even if the defense has no intention of examining any of them.[7] The "mission" of the Confrontation Clause is "to advance the accuracy of the truth-determining process in criminal trials." *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985). See *Maryland* v. *Craig*, 110 S. Ct. 3157, 3163 (1990); *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987). That goal is not advanced by the purposeless expenditure of effort inherent in petitioner's position.

Petitioner's argument for extending *Roberts* to a case such as this one gains no support from this Court's de-

[7] Similarly, the courts would be called upon to resolve factual questions regarding the availability of declarants that the defense had no interest in subpoenaing or examining, solely to determine whether the declarants' out-of-court statements were admissible.

cisions addressing the manner in which witnesses may give live testimony in child abuse cases. *Maryland* v. *Craig*, *supra*; *Coy* v. *Iowa*, 487 U.S. 1012 (1988). See Pet. Br. 22-25. The only issue in those cases was the extent of a defendant's right to engage in face-to-face confrontation with a witness who actually testifies at trial. As the Court noted in *Coy*, 487 U.S. at 1016, that question is distinct from the extent to which the Confrontation Clause limits the use of hearsay evidence. *Inadi* establishes that co-conspirator statements are admissible without any showing of availability, but it does not suggest that the government could call the declarant to the stand without affording the defendant an opportunity for face-to-face confrontation. The converse is also true. The fact that a showing of particularized necessity is required before a child witness is permitted to give live testimony by closed circuit television does not suggest that the same showing must be made to admit out-of-court statements that are admissible under the law of evidence and the reasoning of *Inadi*. Because the principles of *Inadi* apply to the hearsay exceptions at issue in this case, the admission of the evidence was therefore consistent with the Confrontation Clause, without the need for a special showing of necessity based on the legal unavailability of the declarant.

II. S.G. WAS NOT A "WITNESS AGAINST" PETITIONER WITHIN THE MEANING OF THE CONFRONTATION CLAUSE

There is another, more fundamental reason to conclude that the admission of S.G.'s out-of-court statements was not contingent on a showing that she was unavailable: S.G. was not a "witness against" petitioner within the meaning of the Confrontation Clause. The text of the Clause, its history, and the holdings (as well as most of the reasoning) of this Court's decisions are all consistent with that view.

At the time the Sixth Amendment was adopted, as now, a "witness" was understood to be "one who gives testimony" or who "testifies," *i.e.*, "[*i*]*n judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." *Maryland* v. *Craig*, 110 S. Ct. 3157, 3173 (1990) (Scalia, J., dissenting) (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)).[8] When she made the statements admitted into evidence in this case, S.G. was not speaking in that capacity. She was not giving "testimony," and her statements were not made "for the purpose of establishing or making proof of some fact."

A frightened child responding to questions from her mother and others while under the emotional influence of an assault is not acting as a "witness against" an individual who may subsequently be charged with a crime arising from the incident. The same is true of a young patient who describes the nature of an assault to medical personnel in order to enable them to ascertain her condition and design an appropriate course of medical treatment. Indeed, as we have shown, the law of evidence authorizes the admission of such statements precisely because they are given under circumstances fundamentally different from those surrounding testimony by a "witness." For purposes of the Confrontation Clause, the term "witness against" more fittingly describes those individuals who actually provide in-court testimony or the functional equivalent—*i.e.*, affidavits, depositions, prior

[8] As Justice Scalia has noted, the term "witness" also referred to any person who was present at an event. As used in the Sixth Amendment, however, the term plainly was not intended to carry that broader meaning. Persons who merely observe matters pertinent to a criminal prosecution are not witnesses "against" the defendant, and it has never been suggested that the Sixth Amendment entitles a defendant to confront observers who contribute nothing to the evidence in a trial. See *Maryland* v. *Craig*, 110 S. Ct. at 3173-3174 (Scalia, J., dissenting).

testimony, or other statements (such as confessions) that are made with a view to legal proceedings.

To be sure, this Court's recent decisions have suggested that all hearsay is subject to scrutiny under the Confrontation Clause—thereby assuming that *all* hearsay declarants are "witnesses against" a defendant within the meaning of the Confrontation Clause.[9] But that assumption has never been explained or justified. It appears to have arisen from the view that only two polar interpretations of the Confrontation Clause are possible—one that would limit the term "witnesses" to persons who actually appear at a defendant's trial, and the other that would reach all hearsay declarants.[10] This case warrants con-

[9] See *Maryland* v. *Craig*, 110 S. Ct. at 3165. For instance, *Bourjaily* v. *United States*, 483 U.S. 171, 181-184 (1987), applied Confrontation Clause scrutiny to statements, made by co-conspirators in furtherance of a conspiracy, that were not made by a "witness against" the defendants as we understand that term. The Court found, in any event, that the statements were admissible. In other cases, the Court has reiterated the "general approach" to hearsay that it first articulated in *Ohio* v. *Roberts*, 448 U.S. at 65, in a manner suggesting that Confrontation Clause analysis is applicable to all out-of-court statements. See, *e.g.*, *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986); *Idaho* v. *Wright*, 110 S. Ct. at 3146-3148.

[10] Justice Harlan's concurring opinions in *California* v. *Green*, 399 U.S. 149, 172-189 (1970), and *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970), are the only opinions that have devoted serious attention to the question whether all hearsay declarants are "witnesses" within the meaning of the Confrontation Clause. In *Green*, Justice Harlan identified two "polar readings" of the Clause with respect to that question—one that would "confer nothing more than a right to meet face to face all those who appear and give evidence at trial" and the other that would create "a blanket prohibition on the use of any hearsay testimony." 399 U.S. at 175. Rejecting the view that any distinctions could be drawn among categories of hearsay, Justice Harlan in *Green* argued for a modified version of the broader interpretation, under which all available hearsay declarants would be required to be produced at trial. *Id.* at 182. A few months later, however, Justice Harlan

sideration of an intermediate interpretation—under which the term "witnesses" would be applied to those individuals who are speaking with a view to legal proceedings, not to all persons who have occasion to make statements that may later be admitted into evidence.

A. The Confrontation Clause Was Not Designed To Police The Development Of Exceptions To The Hearsay Rule

In one of its earliest decisions under the Confrontation Clause, *Mattox* v. *United States*, 156 U.S. 237, 242 (1895), the Court stated:

> The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury * * *.

That is an accurate characterization of the historical roots of the Confrontation Clause. The common-law right

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abandoned that position in favor of the view that the Confrontation Clause provides only a right to confront those who appear and give evidence at trial. *Dutton* v. *Evans*, 400 U.S. at 93-100.

Opinions expressing the views of the Court have devoted little attention to the question whether all hearsay declarants should be deemed "witnesses" for purposes of the Confrontation Clause. In *Ohio* v. *Roberts*, for instance, the Court observed that "[t]he historical evidence leaves little doubt * * * that the Clause was intended to exclude some hearsay," 448 U.S. at 63, and the Court then articulated an analytical framework that on its face would reach all hearsay, *id.* at 65-66. The framework articulated in *Ohio* v. *Roberts* has been reiterated in subsequent cases without critical examination of its premise as to the meaning of the term "witnesses" in the Confrontation Clause. *E.g.*, *Maryland* v. *Craig*, 110 S. Ct. at 3165.

of confrontation that the Framers incorporated in the Sixth Amendment arose to protect criminal defendants from the once-common practice of admitting statements to examining magistrates, affidavits, and other similar hearsay in lieu of live testimony in criminal trials. There is no historical basis, however, for regarding the right of confrontation as a general limitation on the admission of hearsay evidence, and in particular as a limitation on hearsay exceptions of the sort that are at issue here.

1. Although the concept of confrontation dates back to Roman times, see *Coy* v. *Iowa*, 487 U.S. at 1015-1016, the common-law right to confrontation did not begin to emerge until the 16th century. Prior to that period, juries rarely heard witnesses, but typically obtained information "by consulting informed persons not called into court." 5 J. Wigmore, *supra*, § 1364, at 13. See Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 386-387 (1959). By the end of the 16th century, it had become common for the Crown to offer evidence in criminal proceedings. 9 W. Holdsworth, *History of the English Law* 224 (1926). Even so, a criminal trial in that period did not consist of the structured presentation of evidence through live witnesses that is now taken for granted.

A trial was preceded by an aggressive investigation by examining magistrates. Those officials interrogated the prisoner, accomplices, and other persons with relevant information. See 1 J. Stephen, *A History of the Criminal Law of England* 221, 325 (1883). The magistrates' examinations were "intended only for the information of the court. The prisoner had no right to be, and probably never was present. * * * [T]he depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them." *Id.* at 221. After the investigation was complete, the prisoner was arraigned and a jury was sworn. The trial itself consisted principally of an "altercation between the accused, and the prosecutor and his witnesses." 9 W. Holds-

worth, *supra*, at 225. See 1 J. Stephen, *supra*, at 325-326 ("the whole trial, in fact, was a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning").[11]

There was no requirement that the prosecution rely on live testimony. To the contrary, in courts of common law

> [t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.*, the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions.

1 J. Stephen, *supra*, at 326; see 9 W. Holdsworth, *supra*, at 228. Similarly, in the Star Chamber, "the evidence of witnesses was given upon affidavit." 1 J. Stephen, *supra*, at 338.

The notorious trial of Sir Walter Raleigh for treason in 1603 was illustrative of this feature of early English criminal procedure. The crucial evidence against Raleigh included the deposition of one Cobham and a letter that Cobham wrote thereafter, both of which implicated Raleigh in a plot to seize the throne. Raleigh had a written retraction from Cobham and believed that Cobham would testify in his favor at trial. The court

[11] The deficiencies in this procedure led to recognition of a number of common-law rights of criminal procedure—many of which were subsequently embodied in the Fifth and Sixth Amendments. Stephen noted that 16th century trials differed from those of his day in a number of "important particulars," one of which was that "[t]he witnesses were not necessarily (to say the very least) confronted with the prisoner." 1 J. Stephen, *supra*, at 350. See 9 W Holdsworth, *supra*, at 224; *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 421 (1979) (opinion of Blackmun, J.).

nevertheless rejected Raleigh's demand that Cobham be called as a witness. Pollitt, *supra*, 8 J. Pub. L. at 389. See 1 J. Stephen, *supra*, at 333-336; 9 W. Holdsworth, *supra*, at 216-217, 226-228.

The right of confrontation emerged to put an end to this abuse. Although it is uncertain precisely when the right was formally recognized, the practice of requiring live witnesses in place of depositions and affidavits was well established by the mid-1600s. See Pollitt, *supra*, 8 J. Pub. L. at 389-390; 5 J. Wigmore, *supra*, § 1364, at 23 n.47.

2. A number of state constitutions adopted after the Declaration of Independence recognized a right to confrontation.[12] The Sixth Amendment's Confrontation Clause appears to be patterned after those provisions. In particular, the confrontation provision in the Virginia Declaration of Rights is likely to have influenced James Madison when, in the First Congress, he proposed the amendments that ultimately became the Bill of Rights.[13]

[12] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 341, 377 (1971) (Va., Pa., Del., Md., N.C., Vt., Mass., N.H.); Pollitt, *supra*, 8 J. Pub. L. at 397-399.

[13] The records of the Constitutional Convention, state ratifying conventions, the First Congress, and proceedings culminating in the adoption of the Bill of Rights include only brief and unenlightening references to the right to confrontation. In several state ratifying conventions, there were complaints about the failure of the Constitution to include a guarantee of individual rights comparable to those in the state constitutions, and in several instances those discussions touched briefly on the right to confrontation. See 2 B. Schwartz, *supra*, at 665, 690, 841, 913. When the First Congress enacted a resolution proposing the Bill of Rights, however, there was no significant discussion of that right. See 1 Annals of Congress 756 (1789) (*reprinted in* 5 P. Kurland & R. Lerner, *The Founders' Constitution* 262 (1987). See generally E. Dumbauld, *The Bill of Rights* 33-49, 53-54 (1957); *California* v. *Green*, 399 U.S. at 175-177 (Harlan, J., concurring).

The history of the Confrontation Clause thus supports Justice Story's observation that the Clause simply codified the common-law right that had earlier been recognized in England, and "follow[ed] out the established course of the common law in all trials for crimes." J. Story, *Commentaries on the Constitution of the United States* 664 (1833). This Court has drawn the same conclusion:

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court has often said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.

Salinger v. *United States*, 272 U.S. 542, 548 (1926). Accord *Mattox* v. *United States*, 156 U.S. at 243.

3. The right to confrontation is a feature of criminal procedure intended to benefit the defendant. By contrast, the hearsay rule is a feature of the law of evidence applicable to all litigants in both civil and criminal proceedings. During the 17th century in England, "the appreciation of the impropriety of using hearsay statements by persons not called [grew] steadily"; by the early 18th century, the general prohibition on the introduction of hearsay "receive[d] a fairly constant enforcement." 5 J. Wigmore, *supra*, § 1364, at 18. From the outset, however, the hearsay rule was subject to exceptions. Scholars have found that at least the following exceptions had taken shape by the late 18th century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence.[14] We have found no evidence that

[14] *Patton* v. *Freeman*, 1 N.J.L. 113, 115 (1791) (co-conspirator declarations); 5 J. Wigmore, *supra*, § 1430, at 275 (dying declarations); *id.* § 1518, at 426-428 (regularly kept records); *id.* § 1476, at 350 (declarations against interest); *id.* § 735, at 78-84 (past recollection recorded); *id.* § 1480, at 363 (pedigree and family history); *id.* § 1580, at 544 (reputation evidence). See also 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).

the common-law right of confrontation or the Confrontation Clause was regarded as a check on these exceptions or on the development of the hearsay rule in general.

B. This Court's Decisions Do Not Require The Court To Hold That Every Hearsay Declarant Whose Statement Is Offered By The Prosecution Is A "Witness Against" The Defendant

During the past 200 years, the hearsay rule has evolved in both state and federal law. A major aspect of that development has been the recognition of exceptions, like those at issue here, that authorize the admission of out-of-court statements regardless of the declarant's availability. During virtually all of that period, courts regularly rejected arguments that the Confrontation Clause regulates the admissibility of all out-of-court statements.[15]

Until very recently, this Court's cases also provided no support for such a contention. Until *Ohio* v. *Roberts*, all

[15] The Confrontation Clause was "incorporated" in the Fourteenth Amendment and applied to the States in 1965. *Pointer* v. *Texas*, 380 U.S. 400, 403-406 (1965). Prior to that time, the constitutions of virtually every State contained a provision substantially equivalent to the Confrontation Clause. 5 J. Wigmore, *supra*, § 1397, at 155-158 n.1. Many state decisions had rejected claims that admission of hearsay within exceptions to the hearsay rule violated state constitutional provisions. *Id.* § 1397, at 159-162.

Wigmore's position was that the Confrontation Clause "does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infrajudicially—this depends on the law of evidence for the time being—but only what mode of procedure shall be followed—i.e., a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infrajudicially." 5 J. Wigmore, *supra*, § 1397, at 159. In our view, however, this Court's cases establish that prior testimony (and other statements of the same basic character) are made by a "witness against" the defendant within the meaning of the Confrontation Clause, and a state statute purporting to admit that testimony in lieu of a live appearance by an available witness would be unconstitutional.

but two of this Court's cases applying the Confrontation Clause to hearsay involved prior testimony or confessions —statements functionally identical to those whose use in early English trials led to recognition of the common-law right to confrontation.[16] The two exceptions held that the admission of statements by co-conspirators in furtherance of a conspiracy did not violate the Confrontation Clause.[17] Nothing in this Court's cases suggested that the Confrontation Clause was applicable to all out-of-court statements.

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[16] See *Reynolds* v. *United States*, 98 U.S. 145, 158-161 (1878) (testimony at a prior trial); *Mattox* v. *United States*, 156 U.S. at 240-244 (same); *Motes* v. *United States*, 178 U.S. 458, 471-474 (1900) (testimony at "preliminary trial"); *Pointer* v. *Texas*, 380 U.S. at 406-408 (preliminary hearing testimony); *Douglas* v. *Alabama*, 380 U.S. 415, 418-420 (1965) (co-defendant's confession to police); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) (same); *Barber* v. *Page*, 390 U.S. 719, 722-725 (1968) (preliminary hearing testimony); *Berger* v. *California*, 393 U.S. 314 (1969) (same); *Bruton* v. *United States*, 391 U.S. 123, 126-128 & n.3 (1968) (co-defendant's confession); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (same); *California* v. *Green*, *supra* (preliminary hearing testimony and statement to police officer); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972) (prior testimony). See also *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897); *Kirby* v. *United States*, 174 U.S. 47, 54-61 (1899); *Dowdell* v. *United States*, 221 U.S. 325, 329-330 (1911); *Diaz* v. *United States*, 223 U.S. 442, 449-452 (1912); *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); *Bridges* v. *Wixon*, 326 U.S. 135, 153-154 (1945).

[17] *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Delaney* v. *United States*, 263 U.S. 586, 590 (1924). In *Dutton*, no majority of the Court agreed on a common approach to the Confrontation Clause. Four Justices joined a plurality opinion that emphasized their intention not to constitutionalize all aspects of the hearsay rule, 400 U.S. at 86 & n.17, and rested on narrow factual grounds, *id.* at 87-90. Justice Harlan provided the fifth vote; as noted, he concluded that the Confrontation Clause did not regulate the scope of exceptions to the hearsay rule. *Id.* at 93-100. In *Delaney*, the Court rejected out of hand the argument that the admission of co-conspirator statements violated the Confrontation Clause, holding that the admissibility of such statements is "much in the discretion of the trial judge." 263 U.S. at 590.

The view that the Confrontation Clause applies some limitations on *all* hearsay gained its first support in this Court from the "general approach" articulated in *Ohio* v. *Roberts*, 448 U.S. at 65. The breadth of that approach, however, was unnecessary to the decision of that case. The hearsay at issue in *Roberts*, as in many of the Court's prior cases, was the preliminary hearing testimony of a witness who could not be located at the time of trial. This Court held that the testimony was admissible because it had been "tested with the equivalent of significant cross-examination" and the witness was unavailable to testify at trial. 448 U.S. at 70, 77. Nothing in the facts of the case called for the formulation of a test going beyond the kinds of out-of-court statements to which the Confrontation Clause had already been routinely applied; indeed, the principles articulated in *Mattox* v. *United States*, *supra*, and *Motes* v. *United States*, *supra*, were sufficient to decide the case.

In *Inadi*, the Court made clear that *Roberts* did not dictate application of a "rule of necessity" to out-of-court statements other than prior testimony. Nevertheless, the second aspect of the "general approach" described in *Roberts*, which mandates an inquiry into the reliability of out-of-court statements, has been applied in subsequent cases. Thus, the Court has held that the admission of an out-of-court statement is prohibited by the Confrontation Clause unless the statement "falls within a firmly rooted hearsay exception," *Bourjaily* v. *United States*, 483 U.S. 171, 183 (1987), or possesses "particularized guarantees of trustworthiness," *Idaho* v. *Wright*, 110 S. Ct. at 3146-3147.

It is difficult to attribute that kind of inquiry to the Framers of the Bill of Rights. In particular, it is unlikely that the Framers recognized a distinction between those hearsay exceptions that might be adopted and ultimately regarded as "firmly rooted" and those that would not acquire that status. And it seems equally unlikely that the Framers intended the right of confrontation to

be transformed into a general test of the reliability of out-of-court statements. Yet the Court has been driven to that construction of the Confrontation Clause because, starting from the premise that all out-of-court declarants are "witnesses against" the defendant, the plain language of the Confrontation Clause would appear to prohibit the admission of any out-of-court statements against a defendant in a criminal case, a position with no historical support whatsoever.[18]

Where the consequences of following a premise to its logical conclusion are themselves illogical, it is the premise that may be at fault. In this case, the premise—that the term "witnesses against" refers to all hearsay declarants—has crept into the law without close analysis, and it is contrary to the natural meaning of the term "witness," the history of the concept of confrontation as incorporated into the Constitution, and the absence for nearly 200 years of constitutional scrutiny of the evolution of the hearsay rule. The broad conception of the term "witnesses against" that underlies *Roberts* and some of the Court's subsequent Confrontation Clause cases should thus be re-examined. S.G. should not be considered a "witness against" petitioner within the meaning of the Confrontation Clause, and her out-of-court state-

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[18] The only case in which the "general approach" from *Roberts* has been employed to exclude evidence other than prior testimony or testimonial statements to law enforcement authorities is *Idaho* v. *Wright, supra*. In *Wright*, however, the Court did not address the question whether the child declarant was acting as a witness when she made statements to a pediatrician that were excluded under the Confrontation Clause. Moreover, the questioning in that case occurred after the declarant had been taken into custody by police, and the state court's characterization of the questioning suggests that it was designed to develop evidence for a criminal case. See 110 S. Ct. at 3148. The questioning therefore may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a "witness." The decision in *Wright* is therefore not necessarily inconsistent with our position.

ments should not be excluded on Confrontation Clause grounds.

CONCLUSION

The judgment of the Appellate Court of Illinois, Fourth Judicial District, should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari To The Appellate Court Of Illinois,
Fourth Judicial District

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation. NACDL is made up of more than 5,000 lawyers and 25,000 affiliate members. NACDL was formed more than thirty years ago to advance the study of criminal law, as well as to promote the expertise and integrity of criminal defense attorneys.

One of NACDL's most important objectives is to preserve individual rights and liberties established by the Constitution of the United States. NACDL seeks to ensure that all persons accused of crimes receive a fair trial, and that the wrongly accused are exonerated. There is no right more important to these objectives than the Sixth Amendment right to confront witnesses.

The Amicus Curaie Committee of NACDL has concluded that this case could have a great impact on the ability of jurors to accurately determine guilt or innocence in criminal trials. Due to the importance of this case, NACDL offers its assistance to this Court.

SUMMARY OF ARGUMENT

This Court has consistently, and wisely, interpreted the Confrontation Clause to prohibit prosecutors from substituting hearsay for the testimony of an available witness. While this rule is not without exception, it provides the presumption to be followed in considering the admissibility of hearsay at trial. Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 3146-3147 (1990)(citing cases). The Illinois appellate court's conclusion to the contrary is unsupported by the decisions of this Court.

The adoption of a "juvenile exception" to the unavailability requirement of the Sixth Amendment would create confusion in the trial courts and therefore disparate treatment of defendants. Further, the

likelihood of conviction of innocent people would be substantially increased.

The Court has painstakingly analyzed the application of the unavailability requirement to cases involving established exceptions to the hearsay rule. The abolition of the unavailability requirement for juveniles is unprecedented; it would create confusion in the courts resulting in the disparate treatment of similarly situated defendants. The scope and application of this exception to the general rule would be undefined as to the age or maturity of the children to whom it applied, as well as the nature of the offenses which would be included. This Court must not open this Pandora's box of litigation.

Further, the elimination of the unavailability requirement on a broad

basis would have little benefit, while significantly damaging the certainty and accuracy of the fact finding process in the nation's trial courts.

The only benefit that could be derived from the elimination of the unavailability requirement would be to spare children who truly are the victims of crime from the anxiety of testifying in court. While testifying is unpleasant for any victim, child or adult, the experience frequently causes no undue distress for children. In cases in which a child would be traumatized by testifying before a defendant, this Court has already approved procedures that adequately protect the child, while preserving the integrity of the fact finding process. Maryland v. Craig, 497 U.S. ___, 110 S.Ct. 3157 (1990).

The damage to the search for truth caused by eliminating the unavailability requirement for juveniles would be profound and extensive. Due to the limited cognitive and perceptual abilities of children, as well as their susceptibility to suggestions from adults, the likelihood of inaccurate claims of abuse at the hands of a particular individual are greater for children than adults. The ability to confront and cross-examine therefore increases as the age of the accuser decreases.

Further, should the unavailability requirement be eliminated, the only Sixth Amendment standard for determining the admissibility of out-of-court statements by children would be the test of reliability. In Idaho v. Wright, the Court indicated, in dicta, that statements

by child declarants which fall within established exceptions to the hearsay rule should be deemed "reliable" for purposes of the Confrontation Clause.

The exceptions to the hearsay rule are based on logical conclusions that the circumstances surrounding the making of such statements render misrepresentation unlikely. The logical bases for these exceptions often apply weakly, if at all, to children. While an adult is unlikely to mislead a treating physician, a small child is unlikely to appreciate the significance of the doctor-patient relationship. The spontaneous utterance of a child is far more likely to be the result of fantasy than is the case with an adult.

The elimination of the unavailability requirement would provide a means and an

incentive for prosecutors to conduct trials based on hearsay. Children who are alleged victims of abuse will be sent for treatment, conveniently resulting in admissible evidence through expert witnesses. Innocent defendants will become the victims of erroneous accusations.

The dictates of the Confrontation Clause require that the decision of the Illinois appellate court be reversed. The Court must hold that the prosecution's duty to either produce the declarant or make a showing of unavailability is not a product of the age or maturity of the alleged victim, or the nature of the charged offense.

ARGUMENT

THE ELIMINATION OF THE UNAVAILABILITY REQUIREMENT FOR CHILDREN WOULD SEVERELY DAMAGE THE CONFRONTATION CLAUSE AND THE SEARCH FOR TRUTH IN CRIMINAL TRIALS

I. The lower court clearly erred in holding that witness unavailability is irrelevant to Confrontation Clause analysis

In interpreting the Confrontation Clause, this Court has never departed from the presumption that prosecutors must produce available witnesses whose statements will be admitted in support of conviction. In its most recent decision addressing this issue, the Court again stated that, "[I]n the usual case ..., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use

against the defendant." Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 3146 (1990), quoting Ohio v. Roberts, 448 U.S. 56, 65 (1980). The Court also again made it clear that the Confrontation Clause will prohibit the prosecution from introducing hearsay which may be admissible under the rules of evidence. Id. at 3146.

The Illinois appellate court, which issued its opinion prior to the decision in Wright, was therefore clearly incorrect in its conclusion that witness unavailability is irrelevant to the Confrontation Clause. (J.A. 42). No further discussion on this point is necessary.

II. The unavailability requirement must apply equally to juveniles and adults

The Court in Wright declined to address the question of whether an exception to

the unavailability requirement may exist for hearsay statements made by children alleged to be victims of abuse. 110 S.Ct. at 3147. To design such an exception would be contrary to the Court's prior Confrontation Clause decisions, would create confusion and disparate treatment of defendants in trial courts, and would significantly increase the likelihood of innocent defendants being wrongfully convicted.

A. Confusion in the courts/disparate treatment of defendants

This Court has wisely refused any suggestion to create broad, untested exceptions to the unavailability requirement. The Court has instead carefully analyzed the application of this requirement to specific, tested and established exceptions to the hearsay

rule. In three decisions spanning a period of twelve years, the Court concluded that prosecutors may not substitute prior testimony for live testimony from an available witness. Ohio v. Roberts, 448 U.S. 56, 66 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968).

Similarly, in United States v. Inadi, 475 U.S. 387 (1986), the Court conducted a painstaking analysis of the applicability of the unavailability requirement to another well established hearsay exception, statements by co-conspirators. The Court reviewed the benefits and burdens to the parties that would result from requiring the prosecution to call co-conspirators to the witness stand. Id. at 394-400. Due to the peculiar nature of co-conspirators' statements, the Court

found the general rule of unavailability to be inapplicable. Id. at 399-400.

The Court must continue this carefully reasoned approach to defining the relationship between the Confrontation Clause and the hearsay rule, and, as in Ohio v. Roberts, "reject the invitation to overrule a near century of jurisprudence." 448 U.S. at 67, n.9. Should the Court attempt to fashion an unavailability exception for hearsay from children, years of confusion and disparate treatment of offenders will occur in the trial courts while attempts are made to define this unprecedented exception not only to the Sixth Amendment, but to the laws of the United States and England.

Courts would be forced to define the scope and limits of this exception to the unavailability requirement in an ad hoc

manner. Where would the exception begin and end? Would it apply only to cases in which a child was the alleged victim? If so, what offenses would fall within the scope of the exception? Would it be used in cases when a child witnesses a heinous crime against another? If the exception applied only to victims, would the result not be to allow the use of hearsay when the juvenile's testimony is crucial to the prosecution's case, while requiring confrontation when the young witness gives evidence of limited significance?

Would this new exception apply to all minors under a given age? Would it not be better to base the decision on the actual maturity of the individual child? Cf. Kentucky v. Stincer, 482 U.S. 730, 741, n.11 (1987), quoting Wheeler v. United States, 159 U.S. 523, 524 (1895). Would

the trial court be required to hear testimony to determine whether the child was sufficiently sophisticated or vigorous to withstand the stress of giving testimony? If so, would it not be best to employ the balance struck by the Court in Maryland v. Craig, allowing witnesses -- specifically found to face undue trauma should they appear in open court in a particular case -- to testify outside of the defendant's presence? 497 U.S. ___, 110 S.Ct. 3157, 3169 (1990).

These questions are not raised, and therefore cannot be answered, in the present case. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). Years, if not decades, of appellate decisions would be required to define and limit a "juvenile exception" to the unavailability requirement. Should the Court create such

an exception, it would head off on a path never before seen or contemplated, a path which would cut through the heart of the Sixth Amendment. Certainty and fairness would be replaced by puzzlement and disparity. The Court must avoid this departure from the well defined path created by well reasoned precedent.

B. Benefit versus burden analysis

Should any doubt remain as to the continuing validity of the unavailability requirement as applied to children, that doubt is cast aside by a balancing of benefits and detriments such as was conducted in United States v. Inadi, 475 U.S. at 394-400.

1. Benefit - Protection of juveniles

The only benefit that would come from allowing prosecutors to substitute hearsay

for live testimony would be the protection of minor witnesses from the anxiety of appearing in court. While the protection of children is a most legitimate concern, it cannot support such a broad restructuring of the Confrontation Clause.

First, there is no persuasive evidence that children find testifying any more disturbing than do adults in any given case. Kentucky v. Stincer, 482 U.S. at 746, n.20. If such compelling evidence existed, the Court, in Maryland v. Craig, would have had no reason to require that a witness be allowed to testify on a one-way video system only upon the presentation of compelling evidence that the specific witness would be traumatized by appearing before the accused in open court. 110 S.Ct. at 3169.

Secondly, the Court, in Maryland v. Craig, has already approved of a procedure which protects juveniles who would be significantly traumatized by testifying in court in the presence of the accused. Id. After the trial court makes such a finding with regard to a particular child, that witness is permitted to testify outside of a courtroom without seeing the accused. Id. Any remaining benefit that would arise from generally excusing minors from testifying is far outweighed by the damage that such a rule would cause.

2. Burden - Confusion/disparity

Should the Court created a "juvenile exception" to the Confrontation Clause, it will, as set forth at pages 13-15, above, cause years of confusion and attendant disparate treatment of persons accused of crimes involving children.

3. Burden - Wrongful convictions

a. Accusations by juveniles

A "juvenile exception" to the unavailability requirement would seriously damage trial courts' ability to serve the search for truth and the exoneration of the falsely accused. This exception would greatly increase the likelihood that the judicial system would accomplish that which it is designed to prevent -- the conviction and punishment of the falsely accused.

The potential for wrongful allegations are greater when the accuser is a child as opposed to an adult. While both may have discernible motives, such as hatred or jealousy, for making spurious claims against another, children are also subject to making such claims as a result of their

immature mental processes or the influence of incompetent or malevolent adults.[1]

Judge Lindsay Arthur, Senior Judicial Scholar for the National Council of Juvenile and Family Court Judges, noted some of the risks which arise when a young child is the alleged victim and key witness in an abuse prosecution:

> The first interview with the child is crucial. The credibility of the child must be determined. . . .If the interviewer comes on too strong, the child may suffer . . . trauma. If the interviewer is hostile, the child may close up. If the interviewer is suggesting or demanding, the child may parrot what the interviewer wants, then and afterwards. If the interviewer is too sympathetic, the child may exaggerate to get more sympathy.
>
> Children, more than adults, react to their questioners. They may be more concerned with what the questioner wants than they are with the actual facts. They may fear the questioner and not want to cross him. They may feel the questioner knows more of the facts than they do, so they adapt their version to his. They may respect the questioner and want to help him.
>
> Children, more than adults, are suggestible. Ideas can be planted in their heads, it may render all of their subsequent testimony inadmissible. If inaccuracies can be planted, innocent people may be hurt.

L.G. Arthur, Child Sexual Abuse: Improving the System's Response 15 (1989). See also G.S. Goodman, "The Child Witness: An Introduction", 40 Journal of Social Issues 1 (1984); L. Berliner and M.K. Barbieri, "The Testimony of the Child Victim of Sexual Assault", 40 Journal of Social Issues 125 (1984).

Studies have demonstrated that very young children are limited not only in

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[1]The author wishes to thank fellow NACDL member Gregory D. Smith, Esq., for his assistance in preparing this portion of the brief. Mr. Smith is the national chair of the American Bar Association/Young Lawyers Division Juvenile Justice Committee and also teaches criminal law and juvenile law at Austin Peay University in Clarksville, Tennessee.

their abilities to accurately relate past events, but also in understanding moral concepts such as being truthful while under oath. See, e.g., L. Kohlberg, "The Development of Children's Orientations Toward A Moral Order, 6 Vita Humana 11, 30 (1963); Woodbridge, "Physical and Mental Infancy in the Criminal Law", 87 U. Pa. L.R. 426, 429 (1939).

The limitations on children's abilities to discern right from wrong have long been recognized in the law. Blackstone acknowledged an irrebuttable presumption that children under the age of seven years are doli incapax (incapable of criminal intent) because of their limited ability to separate the permissible from the impermissible. W. Blackstone, 4 Commentaries on the Laws of England 21-24 (1769). This Court continues to recognize

that children cannot be expected to meet the same moral and ethical standards as adults. Thompson v. Oklahoma, 487 U.S. at 825, n.23.

Dangers of wrongful conviction are therefore increased when the alleged victim and key witness is a child. It is particularly important in such cases that the alleged victim appear before the jury where falsehoods may be uncovered through cross-examination.

b. Hearsay by juveniles

In Idaho v. Wright, 110 S.Ct. at 3149, the Court indicated, in dicta, that statements falling within firmly rooted exceptions to the hearsay rule will be deemed reliable for purposes of the Sixth Amendment regardless of whether the declarant is a child or an adult. Should the unavailability requirement be

eliminated for juveniles, any such hearsay statements would presumably be deemed admissible without further inquiry.

The same cognitive limitations which make children's allegations suspect apply to statements which fall within long recognized exceptions to the hearsay rule. The rationale supporting such exceptions is often lacking when the declarant is a child. For example, evidence is admitted under the medical diagnosis exception[2] based upon the reasonable premise that an individual will not mislead a physician charged with the victim's health and well being. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶803(4)[01] (1990). While this premise is quite reasonable when applied to adults, it is highly unlikely that a child appreciates the

[2]Fed. R. Evid. 803(4).

importance of the physician-patient relationship. B. Mosteller, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment", 67 N.C.L. Rev. 257, 266 (1989).

Similarly, excited utterances[3] are deemed admissible because adults are expected to respond to similar startling events in comparable ways. Children find the world to be a far more astonishing place than do adults. Children are significantly more subject to fits of fantasy. In short, they may react to an exciting event which may be exciting, or may exist, only in the child's eyes.

It therefore again stands to reason that confrontation and cross-examination are more important when a witness is a minor. The unavailability requirement of

[3]Fed. R. Evid. 803(2).

the Confrontation Clause must apply, at the very least, with equal force to juveniles.

c. Trial by hearsay

Should the unavailability requirement be eliminated for hearsay from juveniles, prosecutors would be provided with a tool for conducting trials by hearsay. Undoubtedly, public and political pressure would encourage the use of that tool in virtually every case.

Children who are the subject of alleged abuse are treated by medical professionals. It would require little, if any, prodding by a zealous prosecutor or police officer to create evidence admissible under the medical diagnosis exception to the hearsay rule. The allegations could then be presented to the jury not by a child who may not convince,

but by a qualified medical expert. It requires a small step indeed for jurors to infer that this expert would not repeat a child's claims without being confident of their veracity. This circumstance comes far too close to allowing expert testimony on the credibility of a crucial witness. See, e.g., United States v. Candoli, 870 F.2d 496, 506 (9th Cir. 1989); United States v. Cecil, 836 F.2d 1431, 1442 (4th Cir.), cert. denied, 487 U.S. 1205 (1988)(citing cases). Convictions of innocent people are certain to follow.

CONCLUSION

Our society abhors crimes against children, and properly so. This truism requires that special care be taken to see that the innocent are not falsely convicted of such crimes.

Confrontation and cross-examination may not always be sufficient to overcome false accusations by a confused child who, with or without the influence of an incompetent examiner or malevolent parent, has placed the weight of the government against one who has done no wrong. Confrontation and cross-examination remain, however, the finest instruments for the prevention of a wrongful conviction. They must not be removed from the Constitution simply because an alleged victim happens to be of tender years.

It is therefore respectfully submitted that this Court must reverse the judgement of the lower court and hold that the prosecutor's duty under the Confrontation Clause to either produce the declarant or make a showing of unavailability does not vary with the age or maturity of the

declarant, or with the nature of the charged offense.[4]

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[4]The author wishes to thank Robert Hoffman, an NACDL member and third year student at the University of Arizona College of Law, for his valuable assistance in the preparation of this brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

BRIEF FOR *AMICUS CURIAE* THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN

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BRIEF FOR *AMICUS CURIAE* THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN

STATEMENT OF THE INTEREST OF THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN

The New York Society for the Prevention of Cruelty to Children (NYSPCC), founded in 1875 and continuously in operation since then, is the oldest child-protective agency in the world. The Society provides its services throughout New York County to a very large, diverse, and often troubled population of children at risk.

Pursuant to its charter granted under the New York State Not-for-Profit Corporation Law, the Society investigates reports of child abuse and maltreatment, provides services to families where possible to keep them intact or takes protective measures, including initiating child-protective proceedings in family court, in order to prevent further harm to the children in question. Through its legal staff, the Society also functions as guardian-ad-litem in custody and guardianship cases in the family, state supreme, and surrogate courts. Last year we protected over 1,000 children and since our inception have protected more than 1,000,000 children in over 600,000 cases.

Another major Society function is in the area of child-protective training. The NYSPCC has trained hundreds of professionals who are required by New York State law to take instruction in recognizing and reporting child abuse and maltreatment. It has also conducted a series of seminars over the past year for family court judges and lawyers in the topic "Techniques for Interviewing Child Victims of Sexual Abuse" under a grant from the New York State Department of Social Services.

The NYSPCC has a historically demonstrated interest in court proceedings involving children, particularly where the courts are dealing with the very sensitive issue of child sexual-abuse victims giving testimony concerning acts of abuse or neglect. The Society respectfully requests that this Court consider its brief of amicus curiae in furtherance of that interest.

The position of The NYSPCC is that the Court should affirm the conviction of the Petitioner, notwithstanding the availability of the four-year old child-victim, S.G., at the time of trial.

SUMMARY OF ARGUMENT

Out-of-court statements made by child sex-abuse victims are unique in that they are often the only evidence that an act of sexual abuse took place, physical evidence of sexual abuse and other witnesses to the act being absent in most cases. These statements are also special because studies in the field of child psychology show that young children rarely fabricate allegations of sexual abuse; studies also show that because of the generally inferior memories of children vis-a-vis adults, their out-of-court statements closer in time to the event are more accurate than their memories of the event at trial months or even years later.

When the out-of-court statements of a child sex-abuse victim – the need for the statements and their trustworthiness already manifest – qualify under a firmly rooted exception to the hearsay rule, the resulting enhancement of the reliability of and need for the statements renders them unassailabale to a Confrontation Clause objection.

The rationale for the holding in *United States v. Inadi*, 475 U.S. 387 (1986), applies *a fortiori* to the out-of-court statements of a child sex-abuse victim. The child's statements qualifying, for example, as spontaneous declarations are more needed and reliable than the out-of-court statements of a coconspirator. It is even less likely, with respect to a very young victim of child sex-abuse, that the flavor and the essence of the child's statements made as part of the res gestae of the crime could be recaptured at trial. The truth-seeking process is frustrated and a state's important interest in protecting sexually abused children from further trauma is thwarted if such evidence is not routinely made available to the trier of fact, whether or not the child is unavailable.

The statements of the child-victim in this case, therefore, were properly admitted notwithstanding the respondent's failure to show that she was unavailable at trial.

ARGUMENT

THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE PROSECUTION TO MAKE A SHOWING OF THE UNAVAILABILITY OF A CHILD SEX-ABUSE VICTIM BEFORE THE CHILD'S OUT-OF-COURT STATEMENTS ARE INTRODUCED AGAINST A CRIMINAL DEFENDANT IF THE STATEMENTS FULLY QUALIFY UNDER A HEARSAY EXCEPTION WHOSE LACK OF THE UNAVAILABILITY FEATURE IS FIRMLY ROOTED IN TRADITIONAL RULES OF EVIDENCE

The necessity for relying on the out-of-court statements of the child sex-abuse victim is manifold. The statements of the victim, whether out-of-court or testimonial, are often the only evidence because of the lack of physical evidence in the great majority of cases,[1] and because there are usually no witnesses to these crimes.[2] In addition, studies in the field of child psychology have shown that a child's memory is inferior to an adult's,[3] and that a child's memory of an event erodes quickly.[4] The account of an event that is usually chronologically closest to the event,[5] i.e. the child's out-of-court statement related in

[1] De Jong & Rose, *Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse*, 84 PEDIATRICS 1022 (1989); Enos, Conrath and Byer, *Forensic Evaluation of the Sexually Abused Child*, 78 PEDIATRICS 385 (1986); Marshall, Puls and Davidson, *New Child Abuse Spectrum in an Era of Increased Awareness*, 142 AMERICAN JOURNAL OF DISEASES OF CHILDREN 664 (1988).

[2] *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988), *citing Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1986).

[3] A.D. Yarmey, *The Psychology of Eywitness Testimony*, 204-5 (1979).

[4] Stevens and Berliner, *Special Techniques for Child Witnesses* in *The Sexual Victimization of Youth*, 246, 254 (Schultz Ed. 1980).

[5] S.G.'s statements to the witnesses in the instant case were made within several minutes up to several hours after the alleged acts of sexual abuse occurred. *Illinois v. White*, 555 N.E.2d 1241, 1243-6 (1990).

court by the testifying witness, is likely to be more accurate than the child's faded memory of the event given in court often many months or even years after the event took place.[6] The courtroom setting is often so intimidating for the child witness that the truth-seeking process is interfered with or even defeated[7] when the testimonial process inhibits the child from stating all that he or she knows. In short, courts should vigilantly maintain an awareness of the basic cognitive differences between adults and children; children are different and the rules of evidence should be applied more liberally to reflect that difference. It is the experience of The NYSPCC that in a large number of cases it would simply not be possible to prosecute without relying on the out-of-court statements of the child-victim.

The out-of-court statements of the child sex-abuse victim, in particular those which qualify under traditional hearsay exceptions, have sufficient reliability to defeat Confrontation Clause objections. Studies have shown that it is unlikely that children will maintain false stories of sexual abuse to authority figures such as parents,[8] and that children in general, especially very young children such as S.G., rarely contrive false allegations of sex abuse.[9] Since the statements of a child sex-abuse victim *standing alone* have been shown, in the professional literature, to be generally reliable, their reliability is dramatically enhanced when such statements qualify under a traditional hearsay exception such as the spontaneous declaration.

Application of the spontaneous declaration exception to the hearsay rule to child sex-abuse victims has been criticized,

[6] *E.g. People v. Debreczeny*, 253 N.W.2d 776, 778 (1977) (trial begun 20 months after defendant's arrest).

[7] Goodman, Levine, Melton, and Ogden, *Child Witnesses and the Confrontation Clause*, 15 LAW AND HUMAN BEHAVIOR 13, 26-29 (1991).

[8] Stevens and Berliner, *supra* note 4, at 250.

[9] Berliner and Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 JOURNAL OF SOCIAL ISSUES 125, 127 (1984); Yates and Musty, *Preschool Children's Erroneous Allegations of Sexual Molestation*, 145 AMERICAN JOURNAL OF PSYCHIATRY 989, 992 (1988).

however, on the basis of arguments that children often do not view an act of sex abuse perpetrated upon them as a startling or shocking event due to their lack of knowledge and experience concerning human sexuality, and because there is often a significant time lag between the act of abuse and the disclosure thereof by the child.[10] Each of these problems goes to an element of the spontaneous declaration exception, i.e. the startling event and absence of time to fabricate between the event and the declaration. 6 Wigmore, Evidence § 1750 (Chadbourn rev. 1976). These objections can be readily overcome if the prosecution demonstrates that each of the elements of the exception has been fully satisfied. It must be shown that the act of abuse constituted a startling event to the child. This can be demonstrated by eliciting information concerning the victim's knowledge of sexuality prior to the event, the general intelligence and knowledge of the child, the behavior or affect of the child at the time of the declaration and any behavioral changes thereafter, statements of the child indicating whether the event was upsetting or traumatic in any way, and any other pertinent information indicating the event was startling to the child.

In deciding whether a statement meets the requirement that the declarant did not have sufficient time to fabricate after the event, the actual time lapse is only one factor to be considered by the trial court since each instance of the rule must be treated upon its own facts and circumstances. 6 Wigmore, Evidence § 1750, p.221 (Chadbourn rev. 1976). The trial court must look to the surrounding circumstances to determine whether there was an opportunity for reflection and invention. *Ibid* at p.202. But that inquiry must necessarily consider "that it is unlikely that a child of tender years will have reason to fabricate stories of sexual abuse." *People v. Bitler*, 146 Ill.App.3d 477, 497 N.E.2d 137 (1986) *citing In re Marriage of Theis* 121 Ill.App.3d 1092, 460 N.E.2d 912 (1984); *see supra* notes 8, 9.

This Court has stated that the line of cases resulting in *Ohio v. Roberts*, 448 U.S. 56 (1980), rests on the strong similarity

[10] Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1755-58 (1983).

between prior judicial proceedings and the trial proper, given the assumption that "[f]ormer testimony is often only a weaker substitute for live testimony." *United States v. Inadi*, 475 U.S. 387, 395 (1986). In comparing and contrasting the coconspirator exemption to the hearsay rule, the Court stated:

> When coconspirators statements are offered by the government ... the statement often will derive significance from the circumstances in which it was made. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

Ibid. Even if it is assumed that *Roberts* states the general rule on unavailability of the declarant due to the Court's reliance on that case in *Idaho v. Wright*, 497 U.S.____, 111 L.Ed.2d 638 (1990), subsequent to *Inadi*, and that *Inadi* is merely an exception to the *Roberts* rule, the *Inadi* rationale applies *a fortiori* to the admission of S.G.'s statements in the instant case. The fundamentally objectionable aspect to the admission of S.G.'s statements is that cross-examination of the child is thereby precluded. But since these statements qualify as spontaneous declarations, were made by a four-year-old victim of sexual abuse very close in time to the event under circumstances that indicate a high degree of reliability,[11] and whose essence could not be recaptured by live testimony, it is "sufficiently clear ... that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." *Idaho v. Wright*, 111 L.Ed.2d at 655, *quoting* 5 Wigmore, Evidence § 1420, p.251 (Chadbourn rev. 1974).

Justice Marshall's dissent in *Inadi* focused in large part on the identity of the declarant as a coconspirator, an "outlaw", noting the ambiguities, code words, and duplicity with which coconspirators conduct business. *United States v. Inadi*, 475 U.S. at 400-411 (Marshall, J., dissenting). Those concerns, that

[11] *See supra* notes 8, 9.

legitimately raise questions concerning the reliability of coconspirator statements, are totally absent from an analysis of the out-of-court statements of a child sex-abuse victim.

By admitting the statements of a child sex-abuse victim under a firmly rooted hearsay exception such as the spontaneous declaration where those statements fully qualify under the exception, a court furthers the state's interests in protecting these children from additional trauma, *Maryland v. Craig*, 497 U.S.____, 111 L.Ed. 666, 685 (1990) while simultaneously furthering the truth-seeking process in a criminal trial because of the inherent trustworthiness of these statements. That trustworthiness, coupled with the need for such evidence and the state's interest in protecting children from additional trauma during court proceedings, outweighs a defendant's Sixth Amendment right to confrontation of the child victim.

The feature of unavailability in a hearsay exception such as the spontaneous declaration is firmly rooted in the rules of evidence in both state and federal jurisdictions.[12] Should the Court overturn such a well-settled principle of a virtually universal rule of evidence, it would be construing *Roberts* in precisely the way it warned against in *Inadi*:

> *Roberts*, however, does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause. . . . *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

United States v. Inadi, 475 U.S. at 392, 394.

[12] *E.g.*, FED. R. EVID. 803, 804; *Jones on Evidence*, chs. 9, 10 (6th ed. 1972); M. Graham, *Cleary and Graham's Handbook of Illinois Evidence*, § 803.1 (4th ed. 1984).

In *Nelson v. Farray*, 874 F.2d 1222 (7th Cir. 1989), Justice Flaum, in a concurring opinion, stated, "I believe that *Inadi* merely reaffirms and applies the *Roberts*' principle that a showing of unavailability is not required in all situations." *Nelson Ibid* at 1231. For the foregoing reasons, your amicus submits that this is such a situation where it is not required.

Based on the experience of The NYSPCC, practicality requires recognizing, in cases similar to this, that the child is a victim of very tender years. Having due regard for the defendant, the Court should nevertheless permit the admission of a child's out-of-court statements which, although not dispositive, should be part of the prosecution's case-in-chief. We support a rule that will be fair to the accused but realistic in allowing the state to make out its case.

CONCLUSION

Since the Illinois Appellate Court upheld the admission of S.G.'s out-of-court statements under an exception to the hearsay rule firmly rooted in traditional rules of evidence, and the child's statements are inherently reliable due to the circumstances in which they were made and could not be recreated in their uniqueness at trial, the defendant's Confrontation Clause rights were not violated even though the child was not shown to be unavailable. The conviction of the defendant for aggravated sexual assault of a four-year old child should, therefore, be affirmed.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The Corporation Counsel of the City of New York generally acts as the presentment agency of juvenile delinquency petitions in Family Court in the City of New York. See N.Y. Family Court Act, §§ 254; 301.2.

The Corporation Counsel prosecutes juveniles between the ages of 7 to 13-years old in Family Court for acts which, if committed by an adult, constitute the crimes of Rape in the first degree, Sodomy in the first degree, and Aggravated Sexual Abuse in the first degree. See N.Y. Penal Law, §§ 130.35, 130.50, 130.70.[1] The Corporation Counsel also prosecutes youths between the ages of 7 to 15-years old in Family Court for acts constituting the crimes of Aggravated Sexual Abuse in the second degree, Rape in the third degree, Sodomy in the third degree, and Sexual Abuse in the first through third degrees, id., §§ 130.67,

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[1]With respect to youths between the ages of 14 to 15-years old, they may be prosecuted as designated offenders in Family Court or as adult juvenile offenders in Supreme Court, by the Office of the District Attorney. See N.Y. Family Court Act, §§ 254-a, 301.2(8).

130.25, 130.40, 130.65, 130.60, 130.55, and the crimes of Attempted Rape, Attempted Sodomy, Attempted Sexual Abuse, and Sexual Misconduct. Id., §§ 110.00, 130.35, 130.25, 130.50, 130.40, 130.20. As in criminal cases, the burden of proof required in all juvenile delinquency fact-finding hearings is "proof beyond a reasonable doubt." N.Y. Family Court Act, §342.2(2).

In 1989, the Family Court Division of the Office of Corporation Counsel established a special Sex Crimes Prosecution Unit to handle the growing number of cases involving arrests of juveniles for rape and other serious sex offenses committed by juveniles, often in the home, the neighborhood, or in the schools. According to State statistics, sex crime arrests for youths age 17 and younger, totaled 634 in 1988, up 19 percent from 531 arrests in 1986, and the arrests of youngsters for

forcible rape rose to 266 in 1988, a 27 percent increase over 1986. Indeed, in 1988, children age 12 years old and younger were arrested more often than 13 and 14-year olds for sex crimes, including forcible rape. See DeStefano, Youth Sex-Crime Rate on Rise, N.Y. Newsday, April 7, 1989, p. 7.

As a result, and due to the populous jurisdiction of the five boroughs of the City of New York, the Corporation Counsel is one of the largest prosecutors of sex crimes in the country.

The high cost to society to care for victims and perpetrators of sexual abuse and crimes, which often continues into, if not throughout, their adult lives, cannot be disputed. By aggressively trying to intervene when an individual is young, the Corporation Counsel and the City of New York hope to rehabilitate youthful sex

offenders and thereby to avoid repetition of such heinous acts and crimes.

Accordingly, the City of New York and its Corporation Counsel have a great interest in the Sixth Amendment standards to be applied in such cases. This is particularly true since we are often dealing with the youngest of the victims, as well as the youngest of the perpetrators.[2]

SUMMARY OF ARGUMENT

In the instant case, petitioner's Sixth Amendment right to confrontation was not

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[2]As a separate matter, in civil child protective proceedings, the New York City Human Resources Administration, acting as a child protective agency through designated Special Assistant Corporation Counsels, may file Family Court Act, Article X, child protective petitions as to child abuse and neglect, including sexual and physical, by parents or lawful guardians. See N.Y. Family Court Act, §1011 et seq. The standard of proof in these civil Article 10 fact-finding hearings is by a preponderance of the evidence. Id., §1046(b)(i).

violated by the introduction at trial of the hearsay statements of the four-year old child victim, where such statements fell within the well-established excited utterance/ spontaneous declaration exception to the hearsay rule. We submit that in Maryland v. Craig, 497 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) and Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), which were decided after the Illinois appellate decision in this case, this Court did not change this important, "firmly rooted" hearsay exception, with its exceedingly strong indicia of reliability. Under the circumstances of this case, where the statements of the four-year old girl were fresh and made in response to a startling event, there need be no showing of unavailability of the witness by the prosecution, and certainly no per se rule requiring a showing of necessity should be

established. For the same reasons, the statements made by the four-year old girl to the treating medical personnel were also properly admitted into evidence, as statements made to medical personnel for purposes of treatment.[3]

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[3]In this brief, the City will only address the question of whether the two "firmly rooted" hearsay exceptions at issue herein require a showing of unavailability, and not the factual issues of what such a showing requires or whether such a showing was established in the instant case, i.e., that the prosecution made a "good-faith effort to produce the witness or demonstrate her unavailability". Ohio v. Roberts, 448 U.S. 56, 74 (1980). See also Idaho v. Wright, supra, 497 U.S. at ___, 111 L.Ed.2d at 652 (case did "not raise the question of whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial -- and, if so, what that showing requires").

ARGUMENT

THE CONFRONTATION CLAUSE IS NOT VIOLATED AND THERE NEED NOT BE A SHOWING OF UNAVAILABILITY WHERE THE STATEMENTS OF THE FOUR-YEAR OLD VICTIM OF SEXUAL ABUSE FELL WITHIN "FIRMLY ROOTED" EXCEPTIONS TO THE HEARSAY RULE FOR EXCITED UTTERANCES OR SPONTANEOUS DECLARATIONS, AND FOR MEDICAL TREATMENT.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. It is applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403-406 (1965); U.S. Const. Amend. XIV.

The right of confrontation embodied in the Sixth Amendment has never been regarded as absolute, but rather in certain cases must give way to competing interests in the criminal trial process. Mattox v. United States, 156 U.S. 237 (1895).

Maryland v. Craig, 497 U.S. ___, ___, 110 S.Ct. 3157, ____, 111 L.Ed.2d 666, 679-680 (1990) (Confrontation Clause permits, where necessary, the admission of certain hearsay statements despite the defendant's inability to confront the declarant at trial). Cf. Michigan v. Lucas, ___ U.S. ___, 111 S.Ct. 1743, 1747-1748 (1991) (Sixth Amendment "not so rigid" so as to prohibit preclusion, in certain circumstances, of probative evidence based on failure to comply with rape-shield statute or valid discovery rules). For, if taken literally, the Confrontation Clause would mean that no out-of-court statements could be admitted against a criminal defendant unless the defendant had the opportunity to cross-examine the declarant. Mattox v. United States, supra, 156 U.S. at 243. Ohio v. Roberts, 448 U.S. 56, 63 (1980).

Accordingly, this Court has "attempted to harmonize the goal of the Confrontation Clause, placing limits on the kinds of evidence that may be received against a defendant" and the "functional purpose" of an opportunity for cross-examination, "with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements." Bourjaily v. United States, 483 U.S. 171, 182 (1987). See also Kentucky v. Stincer, 482 U.S. 730, 737 (1987).

In Ohio v. Roberts, 448 U.S. 56 (1980), with respect to admission of out-of-court statements in the form of prior testimony, this Court required the prosecution, "as a general matter only," to demonstrate both: (1) the unavailability of the declarant, and (2) that the statement "falls within a firmly rooted hearsay exception." Id. at 65. The Court noted,

however, that "[a] demonstration of unavailability" is not always required. Id. at 65 n.7.

Thereafter, this Court held in United States v. Inadi, 475 U.S. 387 (1986), that unavailability is not required when the hearsay statement is the out-of-court declaration of a co-conspirator. Id. at 392-400. This Court stated that Ohio v. Roberts did not "stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." Id. at 392-394. Rather, the Ohio v. Roberts unavailability requirement was applicable only when the hearsay statement is a weak substitute for in-court testimony, not when the statements have "independent evidentiary significance" different from that provided by in-court testimony. United States v. Inadi, supra, 475 U.S. at 394. See also Bourjaily

v. United States, supra, 483 U.S. at 182-183.

In Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), this Court used the Ohio v. Roberts "approach" in evaluating the admission of an out-of-court statement of an unavailable child, which was admitted under a statutory "residual hearsay" exception. The Court held that, under all the circumstances therein, particularly the fact that it was not a "firmly rooted" exception and lacked "indicia of reliability," there was a Confrontation Clause violation. Id., 111 L.Ed.2d at 652.

A. Excited Utterances/Spontaneous Declarations.

In contrast, the instant case involves excited utterances or spontaneous declarations which, in addition to dying declarations, see Mattox v. United States, supra, are one of those categories of "firmly

rooted" hearsay evidence, Coy v. Iowa, 487 U.S. 1012, 1021, and 1033 n.6 (1988), citing Bourjaily v. United States, supra, 483 U.S. at 183, admissible without a case-specific inquiry or showing of unavailability.

Due to their "superior trustworthiness" and of their "... being better than is likely to be obtained from the same person upon the stand," a necessity arises for allowing the use of spontaneous declarations even though they are hearsay statements. 6 Wigmore on Evidence, §1748, p. 199 (Chadbourne Rev., 1974). The special justification for exempting such statements from cross-examination stems from the circumstances in which they were given, i.e., "in the stress of nervous excitement the reflective faculties may be stilled and the utterance become the unreflecting and sincere expression of one's actual impressions and belief." Id. According to

Wigmore, "[i]t follows that the death, absence, or other unavailability of the declarant need never be shown under this exception -- a proposition never disputed (emphasis added)." Id., p. 199.

As far back as 1869, in Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397, 408 (1869) (hereafter Mosley), this Court stated:

> The res gestae are the statements of the cause made ... almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress.... Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results.... In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason.

See Martinez v. Sullivan, 881 F.2d 921, 928 (10th Cir. 1989), cert. denied sub nom.

Martinez v. Tansy, ___ U.S. ___, 110 S.Ct. 740 (1990) (citing Mosley with approval and endorsing "excited utterance" exception as firmly enough rooted in our jurisprudence so that reliability can be inferred within the rationale of Roberts); Puleio v. Vose, 830 F.2d 1197, 1206 (1st Cir. 1987), cert. denied, 485 U.S. 900 (1988) (citing Mosley and "long and storied" English common lineage and holding that a special evidentiary treatment accorded to spontaneous exclamations is ... "steeped in our jurisprudence"); People v. Brown, 70 NY2d 513, 517 (1987) (citing Mosley).

More recently, this Court explained in Idaho v. Wright, supra, that "[t]he basis for the "excited utterance" exception ... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and therefore the circumstances surrounding the

making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." Id., 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 655 (citations omitted).

Indeed, even though some members of this Court have expressed the view that the Confrontation Clause requires "face-to-face" confrontation when a child witness actually testifies at trial, Maryland v. Craig, 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 689 (dissenting opinion by Scalia, J.), there has been universal recognition that "there are, after all, many exceptions to the Confrontation Clause's hearsay rule." Id., 111 L.Ed.2d at 690. Also continually endorsed is the principle that there are valid exceptions to the Ohio v. Roberts "general requirement of unavailability" of the declarant, including that of statements by

co-conspirators, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances" in which [they were made." Id. at 691, quoting United States v. Inadi, supra, 475 U.S. at 395.

In the instant case, petitioner conceded that at least one type of the five sets of out-of-court statements, i.e., those made to the babysitter after the child screamed and the babysitter went up to the bedroom and saw petitioner, who was in the house without permission, leaving the bedroom, met the criteria for admission as spontaneous declarations. People v. Randall White, 198 Ill.App.3d 641, 555 N.E.2d 1241 (4th Dist.), pet. for leave to app. denied, ___ Ill. ___, 561 N.E.2d 705 (1990), cert. granted, ___ U.S. ___, 111 S.Ct. 1681 (1991). He contends nonetheless that the prosecution must either produce the child for

cross-examination or demonstrate the child's unavailability under Ohio v. Roberts, supra (see Pet. br., passim). This argument should be rejected since, as demonstrated above, the excited utterance/spontaneous declaration exception is "steeped in our jurisprudence." Bourjaily v. United States, 483 U.S. at 183. Even the Roberts decision upon which petitioner relies so heavily, notes that "[a] demonstration of unavailability" is not always required. Id., 448 U.S. at 65 n.7.

The admission of such statements under this exception is crucial, especially in a case such as this one where the four-year old victim was likely incompetent to testify. See, e.g., United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979) (three-year old "could not have been subjected to cross-examination even if he had been called as a witness by reason of his tender years," yet

his statements were admissible in criminal proceeding under the spontaneous declaration exception); Jones v. United States, 231 F.2d 244 (D.C. Cir. 1956) (five-year old was incompetent to testify as a witness but statements to her mother were admissible as spontaneous declarations in criminal proceeding).

See also Annotation, Admissibility of Testimony Regarding Spontaneous Declarations Made By One Incompetent to Testify at Trial, 15 A.L.R. 4th 1043 (1982). Cf. Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988), reh. and reh. in banc denied (fact that four-year old girl was presumably incompetent to testify did not bar admissibility of her out-of-court statements as excited utterances in civil damages lawsuit for alleged sexual abuse).

In fact, Dean Wigmore finds that the principle of the excited utterance and

spontaneous declaration exception "obviates the usual sources of untrustworthiness" in childrens' testimony. 6 Wigmore on Evidence, supra, §1751, p. 223.

In addition to the common-law exception, Rule 803(2) of the Federal Rules of Evidence expressly provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Fed. R. Evid. 803(2) (emphasis added); see 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶803(2)(01) (1990 Ed.). The rule has been adopted verbatim in at least 22 states, with several more states adopting extremely similar rules. See id., ¶ 803(2)(02), pp. 803-96--803-103, for compilation of state statutes.

Rule 803 of the Federal Rules of Evidence "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." J. Weinstein & M. Berger, Weinstein's Evidence, p. 803-33 (1990 Ed.).

Petitioner evidences a fundamental misconception when he speaks of this exception as a "shield [for] the child witness from the trauma of testifying." See Pet. br., pp. 19, 28-32. Petitioner does not even address the evidentiary values behind the exception, but merely states that the rationale for the exception is not the same as for co-conspirator statements (Pet. br., pp. 26-28). The long-standing significant evidentiary purposes that this exception

serves cannot be reduced or dismissed in such a manner. Ante, pp. 13-21.

In fact, the "shield" devices petitioner discusses are at issue only when a child actually testifies at trial. As part of the growing recognition of the serious pervasive problem of sex abuse of children, this Court is well aware that state legislatures have devised various alternatives to ease the trauma for when a child testifies in open court. See Coy v. Iowa, supra, 487 U.S. at 1022-1023 (concurring opinion by Justice O'Connor); Maryland v. Craig, supra, 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 683-684. For example, in the State of New York, these alternatives include the use of videotaping under limited circumstances, see N.Y. Crim. Proc. Law, §109.32, and the use of closed-circuit television under limited circumstances. Id., Art. 65.

The existence of such possibilities, however, does not, as petitioner suggests in his brief (Pet. br., pp. 30-32), give any substance to any abrogation of the "firmly rooted" utterance/spontaneous declaration exception. If, for all the above well-recognized reasons, the use of such evidence is warranted because it is, in fact, often the best evidence, the use of devices fostered to cope with the difficulties of children testifying in open court is not dictated.[4]

---

[4]In fact, one commentator has suggested that the valuable purposes of admitting a child's out-of-court statements under this exception may be limited because some courts have taken an overly-restrictive view of when a child's, as opposed to an adult's, statements fit within the contours of the exception. See Yun, J., A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745, 1755-1759 (1983).

Moreover, as the Court below noted in its decision, People v. Randall White, supra, 198 Ill. App.3d. at 660, 555 N.E.2d at 1253, even though Illinois has a separate and newer statutory exception to the hearsay rule for statements by child sex abuse victims, see Ill. Rev. Stat. ch. 38, §115-10 (1987), the instant case does not involve that relatively new and not yet "firmly rooted exception." Cf. Myatt v. Hannigan, 910 F.2d 680, 683-685 (10th Cir. 1990) (because Kansas child hearsay statute was not a "firmly rooted hearsay exception," it required establishing on a case-by-case basis both "adequate indicia of reliability" and "particularized guarantees of trustworthiness"). Cf. Idaho v. Wright, supra (overturning admission of 2½-year old child's out-of-court statement under State of Idaho's "residual hearsay" exception, which is not a firmly rooted exception for

Confrontation Clause purposes and there was no showing of trustworthiness or reliability); Dutton v. Evans, 400 U.S. 74 (1970) (plurality opin.) (reliability inquiry required when evidentiary rule deviates from common-law approach).

In sum, for all these reasons, the excited utterance/spontaneous declaration exception does not require a showing of unavailability.

B. Medical Treatment Exception.

In Idaho v. Wright, supra, in addition to discussing the basis for the well-established "excited utterance" exception, this Court noted that, similarly, "dying declaration" and "medical treatment exceptions to the hearsay rule" are based on the belief that persons making such statements are highly unlikely to lie. Id., 497 U.S. at ___, 111 L.Ed.2d at 655, citing, inter alia, Mosteller, Child Sexual Abuse and

Statements for the Purposes of Medical Diagnosis or Treatment, 67 N.C.L. Rev. 257 (1989). See McCormick on Evidence, §292 (3rd Ed., 1984).

In this case, an Illinois statute, Ill. Rev. Stat. ch. 38, §115-13 (1987), codifies this long-standing, "firmly rooted" medical treatment exception. There is thus no conflict with Idaho v. Wright, supra (see Pet. br., p. 22, n.3), which addresses a separate, statutory "residual hearsay" rule, and, indeed, expressly recognizes the medical treatment exception. So too, Rule 803(4) of the Federal Rules of Evidence provides a hearsay exception for statements made for the purpose of medical diagnosis or treatment, regardless of the availability of the declarant. Fed. R. Evid. 803(4). J. Weinstein & M. Berger, Weinstein's Evidence, pp. 803-36, ¶ 803 (4)[01], pp. 803-143--803-151 (1990 Ed.); State v. Ochoa,

576 F.2d 854, 855-858 (Fla. 3rd Dist. Ct. App. 1991) (distinguishing between medical treatment exception and statutory residual hearsay exception as in Idaho v. Wright). Cf. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

Accordingly, the statements to the nurse and doctor were properly admitted under this exception.

C. **Summary.**

In conclusion, the two "firmly rooted" hearsay exceptions here serve society's long-standing interest in accurate fact-finding, without violating the Confrontation Clause. For all the above reasons, therefore, the City of New York respectfully urges this Court to affirm the order below.

CONCLUSION

THE ORDER BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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NO. 90-6113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RANDALL D. WHITE,

Petitioner,

V.

ILLINOIS,

Respondent.

On Writ of Certiorari to the
Appellate Court of Illinois, Fourth Judicial District

BRIEF OF AMICI CURIAE, THE VICTIM ASSISTANCE CENTRE, INC., AND JOHN B. HOLMES, JR., DISTRICT ATTORNEY OF HARRIS COUNTY [HOUSTON], TEXAS, JOINED BY THE YOUTH VICTIM/WITNESS PROGRAM, KID-PAC, JUSTICE FOR CHILDREN, HOUSTON POLICE FAMILY VIOLENCE UNIT, NATIONAL ORGANIZATION FOR WOMEN (HOUSTON AREA CHAPTER), GRANDPARENTS RAISING GRANDCHILDREN, AND THE ALLIANCE FOR THE RIGHTS OF CHILDREN IN SUPPORT OF RESPONDENT, THE STATE OF ILLINOIS

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NO. 90-6113

IN THE
SUPREME COURT OF THE UNITED STATES

RANDALL D. WHITE,

Petitioner,

V.

ILLINOIS,

Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The Victim Assistance Centre, Inc. is a nonprofit corporation funded partly by Harris County [Houston], Texas, which offices in space provided by and works closely with the County. Its purpose is to lessen the trauma suffered by victims of crime and their families by providing emotional support, criminal justice system information, court accompaniment, referrals, crime victim compensation filing, parole information, reference to other organizations, and other services that prevent or lessen harm to victims and their families. Its responsibilities include cases in which child abuse, neglect, and sexual assault is charged. It has extensive practical experience in processes that will reduce potential harm to child victims and their families caused by the effects of the criminal justice system.

John B. Holmes, Jr. is the elected District Attorney of Harris County [Houston], Texas, with responsibility for the presentation of criminal cases to grand juries and juries. His responsibility includes cases involving charges of crime against children.

All other amici are organizations interested in bettering the lives of children who are victims of crime. For brevity, their descriptions are set out in the margin below.*

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by Respondent, the State of Illinois.

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* The Youth Victim/Witness Program addresses the needs of abused children and their families by providing a link to the criminal justice system, helping the family cope with the resulting issues, and enabling the child and family to participate in the legal process with the least amount of trauma.

KID-PAC is a political action committee whose purpose is to work for the election of officials who care about children and to work for the removal from office of those who do not. This determination is made through the organization's examinations of voting records and public record as well as through research, news reports and investigation.

Justice for Children is a child advocacy group with a primary focus on improvement of the governmental systems that affect children.

The Houston Police Family Violence Unit is a part of the Houston Police Department that investigates crimes related to violence in families.

The National Organization for Women (Houston Area Chapter) is a local chapter of a national organization dedicated to improvement of the status of women. Its purposes include monitoring the courts of Harris County and aiding and assisting other groups to elect judges more attuned to its interests, including its interest in minimizing child abuse.

Grandparents Raising Grandchildren provides support for grandparents who are trying to obtain temporary or permanent custody of their grandchildren due to child abuse. It also provides support for grandparents with such custody and it works for legislative changes affecting the circumstances of such grandparents.

The Alliance for the Rights of Children focusses on enacting federal laws that provide independent rights to children under the law, before the courts.

SUMMARY OF ARGUMENT

It is expected that the brief of Respondent, the State of Illinois, will thoroughly discuss case law and its application to the evidence. This brief therefore does not seek to repeat Respondent's arguments, although amici curiae are generally in agreement with those arguments and wish to express support for them. Instead, this brief deals with the scientific literature of child abuse and with issues of policy.

1. *Defendant's struggle to "distinguish" co-conspirators' statements (as in United States v. Inadi) is unscientific and unsound.* Child abuse closely resembles conspiracy. The literature shows that perpetrators generally use conspiracy-like secrecy techniques such as threats and manipulation (exactly as defendant did here). The literature also shows that the psychological effects often are enough to repress the conspiracy-like secret of child abuse into adulthood—and even then, many victims are unable *even to recall* the abuse without therapy. The likelihood of conspiracy-like repression increases with the length of time after the event. Further, the literature shows that spontaneous reports of abuse by children have exactly the kind of reliability that the common law ascribed to them. Thus, spontaneous declarations of child abuse, close in time to the event, display indicia of trustworthiness and necessity that are just as strong as those of co-conspirators' statements.

2. *Defendant's inflexible approach to requiring necessity is not a workable means of preventing severe trauma to child victims.* The vast majority of children are abused by adults in continuing positions of authority and trust. They usually are fathers, brothers, uncles or mothers' boyfriends (as in this case). Therefore, defendant's unsupported statement that the child victim has a "continuing *adversary* relationship" with the abuser, is unscientific and unsound. Furthermore, children harmed by testifying are those vulnerable to denial, low self-esteem, repression, and inability to trust adults—and these are exactly the harms that invariably are induced by vigorous or "successful" cross-examination. Most importantly, the litera-

ture shows that we are quite unable to predict *which* children will suffer long-term harm into adulthood even though abuse is closely correlated with dysfunctions such as borderline personality disorder. Ironically, children who seem to be "tough" and "strong" enough to "testify without harm" may be precisely those who are *most* at risk, since denial and repression are part of the pathology of child abuse. The effect is like that of carcinogens "causing" cancer—we cannot tell *which* exposed person will develop the disease, although all are at enhanced risk.

3. *Defendant's approach is inherently illogical and would create nonsensical results.* By (erroneously) arguing that he was convicted "solely" by hearsay, defendant seeks to convert the issue into a kind of ersatz "sufficiency-of-the-evidence" test—but this approach would be entirely inappropriate for considering individual items of evidence. In addition, if the child did testify, defendant's reasoning would lead to the anomalous result of excluding her declarations. Defendant's multiple-procedure approach, requiring the judge to experiment with the most intrusive methods before accepting less traumatic ones, would actually aggravate the harm to children who turn out to be the most vulnerable. Perhaps most importantly, there was nothing to prevent cross-examination here; the State actually produced the child, made her available, and made reasonable efforts to call her. Defendant could have cross-examined her but made the tactical choice not to.

ARGUMENT AND AUTHORITIES

I. DEFENDANT'S EFFORT TO DISTINGUISH THE CO-CONSPIRATOR EVIDENCE ADMITTED IN *UNITED STATES V. INADI* IS UNPERSUASIVE AND UNSCIENTIFIC.

Defendant argues that the present case "is entirely different from the relationship between co-conspirators." This argument is based on defendant's unsupported and unscientific assertion that "[u]nlike co-conspirators, who are partners in crime, the [child victim] and the defendant are involved in a *continuing adversary relationship*." Petitioner's Brief 21 (emphasis added).

Defendant is forced to take this position because in *United States v. Inadi*, 475 U.S. 387 (1986), this Court upheld admittance of a co-conspirator's statements even without a showing of unavailability. Therefore, defendant must struggle to distinguish co-conspirators' statements. But defendant's purported "distinction" on the ground of "continuing adversary relationship" is both scientifically unsound and irrelevant to the controlling legal principles.

A. *The hearsay exceptions here are legally like the treatment of co-conspirators' statements in that they are "traditional" and "firmly rooted" exceptions.*

Defendant conspicuously refuses to compare the "traditional," "firmly rooted" nature of the exceptions here to the treatment of co-conspirators' statements. *Cf.* Petitioner's Brief 20-21 (containing defendant's arguments about *Inadi* and co-conspirators' statements). The "firm root[ing]" of these exceptions strongly supports the admittance of the evidence here irrespective of unavailability, even though defendant avoids so recognizing. Amici will not further brief this issue, since it is anticipated that the State of Illinois will thoroughly cover it; the traditional nature of the exceptions merits this concise mention, however, because of defendant's failure to deal with it.

B. *The State of Illinois should not be forced to accept defendant's unscientific assertion that a violated child stands in a "continuing adversarial relationship" to the father, brother, uncle, mother's boyfriend, or other trusted adult who has abused her. Instead, Illinois should be allowed to recognize that suppression and repression occur in this situation precisely as they do in conspiracies.*

The scientific literature shows that child abuse takes place in circumstances that closely mirror the suppression and repression of a conspiracy. For example, the vast majority of abused children are violated not by strangers, but by adults in positions of authority and trust, who exploit the victims' continuing loyalty and tendency toward secrecy. The clear majority, in

fact, are abused "by family members, most frequently by fathers . . . and brothers . . . ." *See* Bryer, Nelson, Miller & Krol, *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1427 (1987); *see also* Swett, Surrey & Cohen, *Sexual and Physical Abuse Histories and Psychiatric Symptoms Among Male Psychiatric Outpatients*, 147 AM. J. PSYCHIATRY 632, 633 (1990). Boyfriends of mothers, as in this case, also are frequent sexual and physical abusers.

Furthermore, as in this case, the trusted adult often threatens the child either implicitly or (with surprising frequency) explicitly and graphically. Ayalon, *The Daughter as a Sexual Victim in the Family*, in A. CARMI & M. ZIMRIN, CHILD ABUSE 135-36 (1984). These threats, together with the relationship to the authoritative adult, usually induce both fear and repression-based shame, which motivate the child to preserve the "secret"—precisely as co-conspirators do. Thus, "[l]ove and tenderness, or emotional blackmail, characterize [the incestuous family member's] approaches toward [the child victim]." *Id.* The abused child's mother usually is a passive but knowing participant in the preservation of this malignant secret, just as a participant in a conspiracy might be. *Id. See generally* J. HERMAN, FATHER-DAUGHTER INCEST (1981). Sometimes, the mother actively works to suppress evidence of abuse, in which event the situation not only resembles a conspiracy; it *is* a conspiracy.

C. Contemporaneous declarations of abuse closely resemble co-conspirators' statements with respect to the necessity rationale of Inadi, because the scientific literature shows that the suppression, repression and secrecy deliberately induced by the trusted adult often last even into the victim's adulthood.

Finally, the victim's motivations toward repression of the conspiracy-like secret survive long after the discovery or termination of the abuse. In fact, many child-abuse survivors continue to keep the secret even after growing to adulthood, because they have "repressed or suppressed memories of the abuse." Bryer et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1430 (1987). "The memories emerge only after a period of contact with sensitive clinicians." *Id.* The repression actually increases over time. *See* Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476, 477-78 (1987). Thus, an attempt to force disclosure of the secret upon a conflicted child in a hostile environment predictably will produce profound resistance by the child—or an "emotional hiatus of some sort," as the defense attorney at trial cynically labelled the result in this case.

Defendant seeks to distinguish *Inadi, supra*, by citing this Court's statement, 475 U.S. at 395, that:

> Conspirators are likely to speak differently when talking to each other in furtherance of their own illegal aims than when testifying on the witness stand.

Defendant's "distinction" is unpersuasive.[1] As the literature demonstrates, this rationale fits the abused child equally well. She is "likely to speak differently" when making a spontaneous utterance close in time to the abuse, than when the repression induced by the abuser causes an "emotional hiatus of some sort" while the child victim is "testifying on the witness stand." In short, the threats, coercion, multiple participants, joint

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1 Defendant also argues, erroneously, that an abused child is "[u]nlike co-conspirators" in that she assertedly is "uniquely accessible to the prosecution." Petitioner's Brief at 21. This unsupported statement simply is wrong. Any prosecutor who has tried child abuse cases knows that abused children are among the most *inaccessible* witnesses to the prosecutor; often, they are accessible instead to the family member or other trusted adults who have abused them. Alternatively, they may often be unable to testify because of events similar to the "emotional hiatus" in this case. The defendant frequently induces repression and secrecy by threats and manipulation, precisely as happens in conspiracies, for the very purpose of making the witness inaccessible. *See generally* the authorities cited in this section of this brief.

enterprise, secrecy, and continued repression that characterize the admittance of co-conspirators' statements, also support admittance of child victims' spontaneous utterances. *Cf. Dutton v. Evans*, 400 U.S. 74 (1970) (statement made *after termination* of object of conspiracy, by co-conspirator implicating defendant, held admissible because during "concealment" phase).

D. Spontaneous declarations of child victims are at least as trustworthy, under the scientific literature, as co-conspirators' statements.

The literature about child victims demonstrates the genius of the common law in evolving the traditional, firmly rooted hearsay exception for spontaneous declarations. Specifically, the literature shows that such spontaneous utterances of child victims have strong indicia of trustworthiness and non-fabrication, just as the common law judges originally surmised.

This is not to say that fabrication does not occur in some unusual cases involving allegations of child sexual abuse. In a small minority of instances, fabrication does occur. The point, however, is that fabrication rarely occurs in the "uncoached," contemporaneous utterances of child victims; instead, the majority of fabrications result from suggestion by an adult (and even then, fabrication is relatively rare). Thus, the literature gives the following illustration of one of these unusual child abuse allegations, one that was not spontaneous:

> . . . In one case, for example, a mother asked her 5½-year-old daughter, "Don't you remember all the times your daddy rubbed your tushy? You *don't*? It was when we lived in the house down on the lake and you thought it was such a funny game and he liked to do it so much; oh, you *must* remember that." After several additional variations on the same theme, the little girl thought that the father had rubbed her "tushy". . . .

Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476 (1987). Thus, defendant's reasoning might lead to exclusion of non-spontaneous hearsay statements resulting from extensive suggestion or "coaching," but this is a factor not present in spontaneous declarations or statements to treating physicians.

On the other hand, reports of abuse by children are extremely likely to be true, if they are spontaneous and close to the event. When the statement is "uncoached," and it describes an act improbable for a child but probable for an adult abuser (as in this case), the literature shows that the indicia of trustworthiness are at their highest. *Cf.* Yates, *supra*, at 477 (describing childrens' capacity to recall and relate accurately in absence of suggestion). These are precisely the kind of statements that are covered by the common law exception for spontaneous declarations.

In conclusion, defendant's efforts to distinguish *Inadi* are directly contrary to the literature. *Inadi* in fact furnishes a close parallel to this case, and the spontaneous declarations of children about abuse possess similar characteristics of necessity and trustworthiness to those of co-conspirators.

II. DEFENDANT'S STRICT APPROACH TO REQUIRING INDIVIDUALIZED PROOF OF "NECESSITY" IS NOT A WORKABLE MEANS OF PREVENTING SEVERE TRAUMA TO CHILD VICTIMS.

A. A "necessity" approach based upon inferences about long-term trauma should not be forced upon the State of Illinois, because the individual nature and degree of long-term trauma, lasting into adulthood, depends upon future events that are unknown and unknowable.

There is an extremely high correlation between child abuse and adult psychiatric disorders. *See* Swett et al., *Sexual and Physical Abuse Histories and Psychiatric Symptoms Among Male*

Psychiatric Outpatients, 147 AM. J. PSYCHIATRY 632, 635 (1990); Bryer et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1429-30 (1987); Steele, *Notes on the Lasting Effects of Early Child Abuse Throughout the Life Cycle*, 10 CHILD ABUSE & NEGLECT 283 (1986); Carmen, Ricker & Mills, *Victims of Violence and Psychiatric Illness*, 141 AM. J. PSYCHIATRY 378, 382-83 (1984); *see generally* M. STRAUS (ed.), ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN (1988); A. CARMI & H. ZIMRIN, CHILD ABUSE (1984).

Unfortunately, however, very little is known about the mechanism or predictability of such disorders.

> We do not know nearly enough about the long-term effects of maltreatment during the early formative years of life. With very few exceptions, we have not followed abused infants and children from early childhood through to adolescence and adult life stages.

Steele, *Notes on the Lasting Effects of Early Child Abuse Throughout the Life Cycle*, 10 CHILD ABUSE & NEGLECT 283 (1986). In fact, it is doubtful that such prediction *ever* can be made. *Id.*

The defendant's response to these overwhelming evidences of long-term effect, lasting into adulthood, is to force an "adversarial testing" of the child. Petitioner's Brief 17. This "adversarial testing" of an abused child is precisely opposite from the treatments that are thought to minimize the effects of child abuse. Among other difficulties, abused children suffer from repression, denial of the abuse, lack of self worth, helplessness, and inability to trust adults. *See, e.g.*, J. LEEHAN & L. WILSON, GROWN-UP ABUSED CHILDREN 3 (1985). Defendant's model of "adversarial testing" would have an authoritative adult, the judge, forcing the child to submit to "adversarial testing" by another adult, the defense lawyer; and that "adversarial testing" of the child would be done in precisely

the way that would most severely aggravate the repression, denial of the abuse, lowered self esteem, helplessness and inability to trust adults that are the primary products of abuse. *Id.*

In fact, what the child needs after abuse is reaffirmation of self worth, reaffirmation of trust, and rejection of the denial and repression. J. LEEHAN & L. WILSON, *supra*, at ch. 1. Ironically, therefore, it seems that the best predictor of lack of harmfulness to the child would be lack of a successful cross-examination. Conversely, defendant's "necessity" reasoning would lead to the anomalous conclusion that the only case in which the judge should permit cross-examination of an abused child would be that in which the cross-examination would be least likely to be successful.

The following shows how the literature treats successful cross-examinations of truthful, abused children:

> Children who have been hurt by [testimony and cross-examination] cite the confusion and sense of failure attendant upon a "successful" cross-examination, guilt because they participated in the crime but were not punished, guilt from the harm done to a valued family member, terror from confronting the accused, exhaustion after hours of testimony, separation from family members who were not permitted in the courtroom, fear that they would be found guilty and put in jail, fear of the strange courtroom setting, and horror at reliving events through testimony. A common concern of young children is that the accused (who may have threatened to kill them if they tell) will jump on them in the courtroom. Many children who are the victim of incest and accuse their own parent fear that the parent will never forgive them.

Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476, 478 (1987). Thus, the

"necessity" theory put forward by defendant would inherently depend, not upon the makeup of the child, but upon whether the cross-examination was likely to be "successful." The most harmful combination would be a truthful child who faces a skillful defense attorney motivated to conduct a "successful" cross-examination. It would be inappropriate to have a judge decide questions of admissibility on the basis of such considerations, and it is submitted that Illinois should be free to reject defendant's model of necessity.

More importantly, it is scientifically unsound to imagine that a judge, psychotherapist, or anyone else can predict the long-term effects, into adulthood, of vigorously cross-examining a truthful abused child. For example, among the adult conditions caused by childhood sexual abuse are delinquency, drug abuse, and a condition known as "borderline personality disorder." *See* Steele, *supra*; K. WHITE, J. SNYDER, R. BOURNE & E. NEWBERGER, TREATING CHILD ABUSE AND FAMILY VIOLENCE IN HOSPITALS 37-40 (1989). Borderline personality, in particular, has been shown in very recent years to be heavily correlated with childhood sexual abuse. *See, e.g.*, J. KROLL, THE CHALLENGE OF THE BORDERLINE PATIENT: COMPETENCY IN DIAGNOSIS AND TREATMENT 41-42 (1988). However, the factors that combine to "cause" borderline personality in one abused child, and that fail to produce this disorder in others, are unknown and probably unknowable. Thus,

> "[w]e do not know enough about the influence which variables such as age of onset and duration of assaults, violence and viciousness, subtle factors of intimidation, seduction, rewards and sympathy, surrounding circumstances, family constellation, constitutional factors, sources of support, and peer relationships have upon development of or protection from borderline traits."

Id. "Information on the long-term effects of sexual abuse is extremely limited, and no systematic longitudal data on childhood victims of sexual abuse exist." K. WHITE et al., *supra*, at 40. Most of the probable factors are in the future anyway, and thus are unknowable at the time of abuse or reporting. The factors probably include genetic factors. *See* Stone, *Constitution and Temperament in Borderline Conditions: Biological and Genetic Explanatory Formulations*, in 1 THE BORDERLINE PATIENT 253 (J. Grotstein, M. Solomon & J. Lang eds. 1987). It is extremely far-fetched to assume that a judge would go into the genetic makeup of an abused child in order to determine whether she can testify without effects lasting into adulthood, but given the scientific literature, that is precisely what the defendant's model of "necessity" would call upon the judge to do. Illinois should not be forced to accept defendant's strict, inflexible, and unworkable criterion of "necessity."[2]

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2 *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 497 U.S. ____ (1990), do not require Illinois to use defendant's inflexible unavailability theory in this case. *Coy* held that the modern solution of screening the victim from seeing the defendant could not be used. *Craig* held that closed circuit testimony required "an adequate showing of necessity." Significantly, neither *Coy* nor *Craig* concerned a "firmly rooted" exception to the hearsay rule. This case, by way of contrast, involves hearsay exceptions that are traditional and were "firmly rooted" at the time of adoption of the confrontation clause.

Furthermore, neither *Coy* nor *Craig* should be interpreted to require the judge to make unattainable findings of individualized future harm, across the board, in every case. *Coy* holds that the State may create hearsay exceptions where "necessary to further an important public policy." 487 U.S. at 1021. *Craig* holds that such a public policy may be made out by "the important state interest in preventing trauma to child witnesses in child abuse cases." 111 U.S. at ____. Neither *Coy* nor *Craig* requires individualized findings in all cases; certainly neither requires individualized showings of unavailability across the board, in cases of firmly rooted hearsay exceptions. Above all, *Coy* and *Craig* should not be extended to require the trial judge to do the impossible. For the reasons given in this section of this Brief, that is the effect of defendant's argument.

Defendant's necessity approach is analogous to deciding to expose a child to a carcinogen unless the child can prove that she, individually, will contract cancer from it. The problem is that some exposed persons will contract cancer, others will not, and all that can be said is that exposure to carcinogens is correlated with cancer. A variety of environmental, viral, behavioral and genetic considerations also influence who gets cancer and who does not, but their impact is too speculative to predict. The same is true of cross-examination about child abuse. Child abuse is epidemic in this country, and it clearly is closely associated with adult personality disorders statistically; yet the severity of resulting disorders cannot be made the basis of accurate *individual* prediction lasting into the child's adulthood.

B. A uniform rule such as that used by Illinois is preferable to a "rule," such as defendant's proposed "necessity" requirement, that actually would depend more upon idiosyncratic differences among trial judges than upon differences among cases.

The model of necessity offered by defendant implies that the trial judge would make a finding that the child was unavailable due to the short or long term effects of testifying and being cross-examined. But this "finding" could not be made without prediction of the kind described in the preceding section of this Brief. Since such a prediction cannot be made on an individual basis, it would instead be made on the basis of the idiosyncratic beliefs or preferences of the trial judge. Illinois should not be forced to accept such a rule.

In fact, since denial and repression are part of the pathology, it is precisely those children who *least* appear to suffer ill effects who may, ironically, be *most* at risk. In other words, if the child "seems" to be "tough," "strong," or able to suffer through what defendant cynically calls "adversarial testing," the probable reason is that the child actually is suffering from denial or repression of the effects of abuse. Instead of being among those most likely to survive the "adversarial testing" intact, as she may seem to the unscientific observer such as a judge, this

"tough" child actually is among those *most* likely to be harmed. Thus, there is great danger that such a finding would frequently be diametrically opposed to reality. Illinois should not be forced to make a finding of necessity under such conditions. Instead, a uniform, traditionally-rooted rule of evidence—such as the rule allowing spontaneous utterances, without reference to whether a child or adult is testifying—should be a permissible choice for Illinois.

III. DEFENDANT'S PROPOSAL IS INHERENTLY ILLOGICAL AND WOULD CREATE NONSENSICAL RESULTS.

A. Defendant's argument actually depends upon a sufficiency-of-the-evidence attack, but this approach should not be used to decide admissibility of the evidence at issue.

Defendant repeatedly (and erroneously)[3] alleges that he was convicted "exclusive[ly]" or "solely" by extrajudicial statements. Petitioner's Brief at 14, 24, 25. This argument actually is an attack on the sufficiency of the evidence (although it is a factually erroneous one, here) and it should not be used to decide the admissibility of the evidence at issue.

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3 Defendant's attacks on the "exclusivity" of this hearsay evidence and upon the asserted lack of "corroboration" (*see* Petitioner's Brief 11) are not only irrelevant; they are wrong. The statements of the child were not the only evidence, and they were corroborated. For example, the child victim's babysitter testified to the child's scream that awakened her, followed by her seeing the defendant exiting the victim's room. Defendant then gave her a thoroughly incredible explanation of why he was in a place where he had no legitimate purpose for being. The child's mother, Mrs. Grigsby, testified to the physical manifestations of defendant's choking of the child victim and of his sexual attack, which included red marks and disturbances in the neck and vaginal areas. Defendant was not convicted "exclusively" on the basis of extrajudicial statements, nor was there any lack of "corroboration."

There is a difference between questions of sufficiency of evidence and questions of admissibility of evidence. The sufficiency of evidence must be evaluated according to a reasonable doubt standard. It will be rare that proof beyond a reasonable doubt can be based solely upon extrajudicial statements of a child victim, unless the evidence is unusually consistent and compelling (as it is in this case). That question, in any case, is entirely separate from the question whether an individual item of evidence should be *admitted*, and defendant's efforts to confuse the two issues by stressing the alleged "exclusivity" of the evidence (or even that this evidence was "primarily" what supported conviction) should be resisted.

What would happen if there were other evidence in the record, which was independently sufficient for conviction? Then, would this defendant be arguing that the "other" evidence somehow would change the effect of the confrontation clause, so that the child's declarations suddenly would become admissible? If so, does the "other" evidence have to be overwhelming? Or (as seems more consistent with a necessity rationale), should hearsay be admissible if the "other" evidence is marginal, or even insufficient for conviction? The answer, of course, is that the rest of the evidence of guilt is irrelevant to defendant's argument. Actually, defendant *must* be arguing (and indeed, he obviously *is* arguing) that hearsay declarations such as these are *never* made admissible by other evidence, no matter how much independent proof of guilt the record might contain. Since that is the argument, it is completely beside the point whether the record evidence is "exclusively" or "solely" or "primarily" hearsay, and defendant's reliance on these concepts is disingenuous.

Furthermore, notwithstanding defendant's rhetoric, it actually is quite common for some elements of a criminal offense to be proved "exclusively" or "solely" by hearsay. For example, a weapons offense may require proof that the weapon travelled in interstate commerce. This "commerce" element normally would be proved by business records, which are hearsay. The prosecution should be free to rely on business records in such

a case, even if by chance there happens to be an available live witness who once worked for a freight company and who remembers transporting the individual weapon at issue. Likewise, in a prosecution for attempted assassination of the President of the United States, the fact that the victim was President should be provable by documentary hearsay or by judicial notice that is based upon such documents. (Indeed, no one can know such a "fact" without having once learned it from hearsay, not even the President himself.) It often is entirely reasonable for the law to rely "exclusively" on hearsay, as these and an infinite variety of other examples would show.

More fundamentally, however, defendant's confusion of the *sufficiency* of the evidence, with its *admissibility*, is illogical and would produce anomalous results. As McCormick observed, "a brick is not a wall." See C. McCORMICK et al., EVIDENCE 543 (3d ed. 1984). To build a wall, one must lay bricks one by one. If the laying of an individual brick were conditioned upon the entire wall being built first, no brick could ever be set. Likewise, defendant's effort to measure the *admissibility* of evidence by its exclusivity, or *sufficiency* to prove the point by itself, would defeat the possibility that any evidence could ever be properly assessed for admissibility.

Perhaps defendant could have argued that an accused person should not be convicted solely by hearsay, or by hearsay without corroboration. A state could adopt such a procedural rule if it chose to. And some hearsay-based convictions, even if based on admissible hearsay, could be attacked as unconstitutional if (for example) the evidence as a whole did not amount to proof beyond a reasonable doubt. But defendant did not (and factually could not) raise either of these sufficiency arguments in this case. His efforts, now, to insert them into arguments about admissibility should not succeed, because they simply are irrelevant to admissibility.

B. There was nothing to prevent cross-examination of the victim by defendant in this case; the State actually produced her, made her available, and made reasonable efforts to call her.

Even if defendant's necessity analysis were compelled by the Constitution, it should not cause reversal here, because defendant was not denied the right or practical ability to cross-examine the child victim in this case. Obviously, the defendant made a tactical choice not to call her for cross-examination. Defendant concluded that the danger of her testifying so as to strengthen the State's evidence was too great, and that the odds of acquittal were greater if defendant simply accepted the evidence as it was.[4] This tactical choice should not obscure the fact that the witness was produced, was present, and could have been called for cross-examination by defendant. Defendant's statement that the child "was not produced for cross-examination" is a misleading play upon semantics.

In fact, defendant's argument would stand the confrontation clause on its head. If the child were a fugitive hidden by her parents (as sometimes happens), or if she were provably so likely to be harmed by cross-examination as to justify a finding to that effect, defendant apparently would recognize her "unavailability" and accept the evidence—even though there could be no cross-examination. But in this case, the defendant's right and practical ability of cross-examination were completely preserved by the production of the victim in the courtroom. The State should not be made worse off by its having produced the victim, to be called for cross-examination by the defense if the defense so chooses, than it would be if it had been unable to produce her at all.

Furthermore, the evidence shows that the State made reasonable efforts to call the child victim in this case. Trial counsel's admission that she did not testify because of an

4 It may be that the child would have refused to speak, or would testify to lack of memory. But in that event she would have been unavailable. Illinois properly could admit her prior statements in that event *even* under defendant's unduly strict theory. *See California v. Green*, 399 U.S. 149 (1970).

"emotional hiatus of some sort" obviously meets the standards of the confrontation clause cases. E.g., *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

C. Defendant's reasoning would lead to the anomalous result that, if the victim testified, her statements would be excluded.

Defendant's strict approach to "necessity" would exclude spontaneous utterances by a witness unless that witness were shown to be "unavailable." But if the witness actually testifies, she is not unavailable. Thus the consequence of defendant's reasoning is that if the victim were unavailable, her statements could be admitted, but if the victim actually testified and were subjected to cross-examination, her statements would be excluded. Illinois should not be forced to accept such an anomalous result.

D. Defendant's multiple-method approach to preventing severe trauma, in which the judge is forced to guess at the proper procedure, would be unworkable in practice.

So inflexible is defendant's "necessity" approach that defendant would have the judge finely calibrate the procedure to be used, guessing at the precise procedure that would most preserve the right of cross-examination while avoiding harm to the child. The judge thus could not use traditional, firmly rooted hearsay rules of uniform application, at all. Instead, defendant argues, "if a child will not suffer severe emotional trauma when testifying by a closed-circuit television, that procedure should be followed." Petitioner's brief 25. But since the judge in any event cannot reasonably determine that a child will not be harmed, will not exhibit borderline personality disorder in adulthood, and will not "suffer severe emotional trauma" from testifying, the pinpoint precision demanded by defendant is even more clearly unattainable.

Presumably, defendant would have the judge first exhaustively examine the child, and then try various of the more intrusive procedures to determine whether she "will suffer severe

emotional trauma." It is precisely this sort of process that justifies scientists' conclusion that "[i]n some cases, procedural assault is added to sexual assault." Yates, *supra*, at 476, paraphrasing Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 BULL. ACAD. PSYCHIATRY LAW 287 (1983). This kind of experimentation would use "lesser" procedures such as closed-circuit television only when the child actually exhibits indicia of "severe emotional trauma" from more intrusive methods. In such an event, the effort to determine the harm not only would be unsuccessful because of the inaccuracy of long-term prediction; in addition, by repeatedly subjecting the child to a sequence of procedures, the court would *ipso facto* cause precisely the harm that is sought to be avoided.

CONCLUSION

The incidence of child abuse is rampant. Its correlation with adult psychiatric disorders and long-term dysfunction is clearly established. But the pinpoint precision in case-by-case determination of harm demanded by defendant is impossible. Among the factors known at the time to the judge, the very success or lack thereof in the cross-examination is probably the best predictor of harm. But most importantly, whether the victim will succumb to borderline personality disorder or other dysfunctions depends upon undetermined (and undeterminable) future events. All that can be said with confidence is that abused children will suffer harm if cross-examined in an effort to deny the abuse, but we are completely unable to identify which children will, and which will not, suffer long-term effects from this continuation of denial and repression of the offense. In fact, children who seem most "strong" and "tough" are precisely those who may be most at risk. For all of these reasons, defendant's strict approach to "necessity" in the form of "unavailability" of child victims, based upon strict showing of individualized harm on a case-by-case basis, is unworkable.

At the same time, contrary to defendant's assertions, the spontaneous declaration exception serves precisely the necessity

and truth-insuring function that the common law inferred it would insure. In this respect, and in the repression and secrecy that surrounds it, spontaneous reports of abuse by children resemble the co-conspirators' declarations deemed properly admitted in *United States v. Inadi, supra*.

Further, defendant's arguments are illogical and would produce anomalous results. The argument that hearsay evidence was "exclusive" and was not "corroborated" is factually inaccurate; but more importantly, these arguments seek to use a sufficiency-of-the-evidence approach to determine the admissibility of evidence—an approach that would lead to the exclusion of virtually any piece of evidence, considered by itself. Defendant's argument would have the anomalous consequence of excluding the evidence even when the child victim is produced, and even when she testifies. More importantly, there was no denial of confrontation in this case because there was nothing to prevent cross-examination of the victim by defendant; the State actually produced her in court, made her available, and made reasonable efforts to call her (desisting only because of what defense counsel himself labelled an "emotional hiatus"). Defendant's proposal for a multiple-method approach to preventing severe trauma, in which the judge must guess at the proper procedure, is unworkable, both because the finely graded judgment about which process is sufficiently unintrusive that it will avoid long-term trauma cannot be made, and because the investigation of the child necessary to determine this issue would cause precisely the kind of harm that the inquiry is designed to avoid.

The decision of the Illinois court below should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RANDALL D. WHITE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Writ of Certiorari from
the Supreme Court of Illinois

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex rel. DANIEL E. LUNGREN, ATTORNEY GENERAL, and the STATES OF

ALABAMA, ALASKA, COLORADO, CONNECTICUT, FLORIDA, IDAHO, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, AND WYOMING

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QUESTION PRESENTED

Does the Confrontation Clause require the prosecution to show that a child witness is unavailable to testify before the child's out-of-court declarations are admitted against a criminal defendant at trial?

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No. 90-6113

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RANDALL D. WHITE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Writ of Certiorari from
the Supreme Court of Illinois

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex rel. DANIEL E. LUNGREN, ATTORNEY GENERAL, and the STATES OF

ALABAMA, ALASKA, COLORADO, CONNECTICUT, FLORIDA, IDAHO, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, AND WYOMING

Amici file this brief pursuant to Rule 37.5 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of respondent, the State of Illinois, which urges affirmance of *White v. Illinois*, 198 Ill.App.3d 641, 555 N.E.2d 1241 (1990), a decision of the Fourth District Appellate Court of Illinois. That court upheld the admission of hearsay evidence by a child sexual abuse victim without a showing that the child was unavailable to testify. The Supreme Court of Illinois denied leave to appeal.

The states have a strong interest in the effective prosecution of child abusers, and the admission of reliable hearsay evidence is often essential to maintaining this interest. Frequently, a child victim's out-of-court statements regarding the offense will be the best evidence in the case. Under these circumstances, reliance on the

out-of-court-statements is necessary, and the utility of confrontation is slight.

The states also have a compelling interest in protecting the emotional well-being of child abuse victims. In a great number of these cases, this interest can best be effectuated if the child is not required to be examined through the judicial process.

If a child's out-of-court statements are made under circumstances rendering it likely that their probative value and reliability cannot be duplicated even if he or she testifies at trial, and if the utility of confrontation is negligible, the states' interest in protecting child victims from further trauma warrants limiting a defendant's right to confront the witness against him by admitting the statement without a showing that the child is unavailable to testify. Accordingly, amici oppose Mr. White's contention that the Confrontation Clause compels the prosecution to produce a hearsay declarant or to show the child declarant is unavailable prior to the admission of an

out-of-court statement that meets the foundational requirements for admission under the exceptions to the hearsay rule for either spontaneous statements or statements made for purposes of medical treatment or diagnosis.

SUMMARY OF ARGUMENT

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to be confronted with the witnesses against him. The right is not absolute, however, and it may be limited if competing interests and the necessities of the case dictate. Accordingly, this Court has held that hearsay evidence may be admitted in a criminal trial, without offending the Confrontation Clause, if the evidence is both necessary and reliable.

The rule of necessity is satisfied if either the declarant of the out-of-court statement is unavailable to testify or the out-of-court assertion is evidence that cannot be replicated even if the declarant testifies. Evidence admitted under the two exceptions to the hearsay rule at issue in this case, the exception for spontaneous statements and the exception for statements made for purposes of medical diagnosis or treatment, particularly when the declarant is a victim of child abuse, is probative evidence

that cannot be replicated. Hence, the rule of necessity is satisfied, and the child need not be shown to be unavailable to testify before her out-of-court statements are admitted.

Additionally, these two exceptions are firmly rooted exceptions to the hearsay rule. Accordingly, reliability of statements that meet the foundational requirements of these exceptions can be inferred, and no showing of particularized guarantees of trustworthiness need be made.

ARGUMENT

I

THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE PROSECUTION TO SHOW THAT A WITNESS IS UNAVAILABLE TO TESTIFY BEFORE HEARSAY EVIDENCE MAY BE ADMITTED IN A CRIMINAL TRIAL IF THE EVIDENCE IS OTHERWISE NECESSARY

The Confrontation Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The primary object of this provision was to prevent the early common law practice of using secret, ex parte depositions, made by persons not in court, as evidence against an accused. See *California* v. *Green*, 399 U.S. 149, 156-157 (1970); *Mattox* v. *United States*, 156 U.S. 237, 243 (1985); 5 Wigmore, Evidence, § 1364, at 13-14, 28, § 1395, at 150, § 1397, at 159 (Chadbourn rev. 1974) [hereafter "5 Wigmore"]. The theory underlying the Confrontation Clause is that the many possible sources of inaccuracy and trustworthiness

that may underlie the assertions of a witness can best be brought to light through cross-examination of the witness while he testifies under oath in the jury's presence. See *Maryland* v. *Craig*, 497 U.S. ___, 110 S. Ct. 3157, 3163 (1990); *Green, supra*, at 158.

The right of confrontation is not absolute, however. This Court has found that competing interests, if closely examined, may justify limiting the right of confrontation at trial. *Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Roberts, supra*, at 64, citing *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), and *California* v. *Green*, *supra*, 399 U.S. 149.

Thus, the Court has consistently held that the Confrontation Clause does not necessarily prohibit the admission of hearsay statements against a criminal

defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause. *Idaho* v. *Wright*, 497 U.S. ___, 110 S. Ct. 3139, 3145-3146 (1990).[1/] The Court has recognized that the general rule set forth in the Clause must occasionally give way to the necessities of the case. *Maryland* v. *Craig*, *supra*, 110 S. Ct. at 3165-3166; *Mattox* v. *United States, supra*, 156 U.S. at 243 (1985).

In *Ohio* v. *Roberts*, *supra*, 448 U.S. 56, this Court laid out a general approach for determining when hearsay statements may be admitted without violating Confrontation Clause requirements. The approach strikes a delicate balance between the states' interest in law enforcement and a defendant's right to confront the witnesses against him and to assure the accuracy of the

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1. Likewise, this Court has held that the Confrontation Clause does not prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by way of one-way closed circuit television, even though the use of such a procedure might seem to violate the literal terms of the Clause. See *Maryland* v. *Craig, supra*, 110 S. Ct. 3157.

truth-finding function. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.[2/]" *Id.* at 65. In addition, the hearsay statement must bear adequate "indicia of reliability" to ensure accuracy in the fact-finding process. *Ibid.*

Five years after *Roberts*, in *United States* v. *Inadi*, 475 U.S. 387 (1986), this Court considered the question of whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a non-testifying co-conspirator. *Id.* at

2. The Court noted here, in a footnote, that a demonstration of unavailability is not always required. *Roberts, supra*, 448 U.S. at 65 n. 7. It continued, "In *Dutton* v. *Evans*, 400 U.S. 74 (1970), for example, the Court found the utility of trial confrontation to be sufficiently remote that it did not require the prosecution to produce a seemingly available witness." *Roberts, supra*, at 65 n. 7.

391.3/ Citing the statement in *Roberts* that the Sixth Amendment establishes a rule of necessity, the Court of Appeals had held that the Confrontation Clause established an independent requirement that the prosecution, as a condition to admission of any out-of-court statement, was required to show the unavailability of the declarant. *Id.* at 391-392. This Court disagreed, declaring that the lower court's interpretation of *Roberts* would effectuate a "wholesale revision of the law of evidence" and would too broadly interpret the Confrontation Clause. *Id.* at 392-394.

The Court then declared that there are good reasons why the unavailability rule, which was developed in cases involving former testimony, is not applicable to

3. The Court noted in *Inadi* that the reliability of the out-of court statements was not at issue in the case. The Court of Appeals had determined that whether or not the statements were reliable, their admission violated the Sixth Amendment because the prosecution had not shown that the declarant was unavailable to testify. *Inadi, supra*, at 391 n.3.

co-conspirators' out-of-court statements. *United States* v. *Inadi, supra*, 475 U.S. at 394.

> "Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony . . . there is little justification for relying on the weaker version. . . .
>
> "Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. . . . [¶] In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. . . . [C]o-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence."

Id. at 395-396.

The Court found, in the context of co-conspirators' statements, that the benefits of an unavailability rule would be slight, for it would contribute little to the truth determining process. *United States* v. *Inadi, supra*, 475 U.S. at 396-398. The burden that such a rule would impose would be significant, however: it would automatically add another avenue of appellate review in these complex cases, and it would place a significant practical burden on the prosecution. *Id.* at 398-399. Accordingly, the Court declined to require a showing of the declarant's unavailability as a prerequisite to the admission of a co-conspirator's hearsay statement. *Id.* at 400.

Read together, *Roberts* and *Inadi* explain that the rule of necessity for resorting to out-of-court statements may be satisfied in one of two ways. First, the declarant of the out-of-court statement may be unavailable to testify, so that if his statement is not admitted, his knowledge will be left unused altogether. Or, the out-of-

court assertion may be such that it is not possible to get evidence of the same value from any other source, so that if the extrajudicial statement is not used, the trier of fact is denied important evidence. See *United States* v. *Inadi, supra*, 475 U.S. 387; *Ohio* v. *Roberts, supra,* 448 U.S. 56; see also 5 Wigmore, *supra,* §§ 1420-1421, at 251-253. Regardless of which way the necessity requirement is satisfied, if the out-of-court statement is trustworthy, so that the test of confrontation would be of minimal benefit, its admission is constitutionally permissible. See *Inadi, supra*; *Roberts, supra*; see also 5 Wigmore, *supra*, §§ 1420-1422, at 251-253.

II

UNAVAILABILITY OF THE DECLARANT SHOULD NOT BE REQUIRED AS A CONDITION OF ADMISSIBILITY OF A CHILD VICTIM'S OUT-OF-COURT STATEMENT UNDER THE EXCEPTION TO THE HEARSAY RULE FOR SPONTANEOUS STATEMENTS

A. The Exception for Spontaneous Statements

An exception to the hearsay rule for certain statements made under the influence of a startling event is universally recognized.[4] E. Cleary, McCormick on

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4. A majority of states have adopted either the Federal Rule of Evidence on spontaneous statements, Rule 803(2), or a draft version thereof: Alaska Rules of Evid., Rule 803(2) (1979); Ark. Stat. Ann. § 28-1001 Uniform Rules of Evid., Rule 803(2) (1976); Ariz. Rev. Stat. Ann. Rules of Evid., Rule 803(2)(1977); Colo. Rules of Evid., Rule 803(2) (1980); Del. Uniform Rules of Evid., Rule 803(2) (1980); Fla. Stat. Ann. Evid. Code § 90.803(2) (1979); Hawaii Rules of Evid., Rule 803(b)(2) (1981); Idaho Rules of Evid., Rule 803(2) (1985); Iowa Rules of Evid., Rule 803(2) (1983); La. Code of Evid., Art. 802(2) (1989); Me. Rev. Stat. Ann., Rules of Evid., Rule 803(2) (1976); Mich. Rules of Evid., Rule 803(2) (1978); Minn. Rules of Evid., Rule 803(2) (1977); Miss. Rules of Evid., Rule 803(2) (1986); Mont. Rev. Codes Ann. § 93-3002, Rules of Evid., Rule 803(2) (1977); Neb. Rev. Stat. §27-803(1) (1975); Nev. Rev. Stat. tit. 4, § 51.095 (1971); N.H. Rules of Evid., Rule 803(2) (1985); N.M. Stat. Ann. Rules of Evid., Rule 803(2) (1976); N.C. Rules of Evid., Rule 803(2) (1984); N.D. Rules of Evid., Rule 803(2) (1977); Ohio Rules of Evid., Rule 803(2) (1980); Okla. Stat. Ann. tit. 12, § 2803(2) (1978); Or. Evid. Code, Rule 803(2) (1982); R.I. Rules of Evid., Rule 803(2) (1987); S.D. Rules of Evid.,

Evidence (3d ed. 1984) § 297, at 854 [hereafter "McCormick"]. The foundational requirements for admission of a statement under this exception are three-fold. First, there must be an event that excites the declarant. Second, the statement must be made during the period of excitement caused by the event. And, third, the statement must "relate" to the startling event. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01], at 803-87 to -94 (1988) [hereafter "Weinstein"]; 4 Louisell & Mueller, Federal Evidence (1980) § 439, at 494-495 [hereafter "Louisell & Mueller"].[5/] The principle

§ 19-16-6 (1978); Tenn. Rules of Evid., Rule 803(2) (1990); Tex. Rules of Evid., Rule 803(2) (1983); Utah Rules of Evid., Rule 802(2) (1983); Vt. Rules of Evid., Rule 803(2) (1983); Wash. Rules of Evid., Rule 803(a)(2) (1979); W. Va. Rules of Evid., Rule 803(2) (1985); Wis. Stat. Ann. § 908.03(2) (1974); Wyo. Rules of Evid., Rule 803(2) (1978).

Other states, which have not adopted the Federal Rules of Evidence, have either codified a spontaneous statement hearsay exception, e.g., Calif. Evid. Code § 1240 (1965), or have case law establishing such an exception, e.g., *Mouzone* v. *State*, 452 A.2d 661 (Md. 1982); *Commonwealth* v. *Fuller*, 506 N.E.2d 852 (Mass. 1987); *Souder* v. *Commonwealth*, 719 S.W. 2d 730 (Ky. 1986).

5. In determining whether these foundational requirements for admission of the hearsay statement are met, courts consider a variety of factors, including: lapse of time from the event to the statement; whether the statement was made at the first safe opportunity; whether

underlying this exception is based on the experience that when these requirements are met, a stress of nervous excitement may be produced that stills the declarant's reflective faculties and powers of fabrication, so that the utterance that occurs is a spontaneous and sincere expression of the declarant's impressions and belief. 6 Wigmore, Evidence, § 1747, at 195, 199 (Chadbourn rev. 1976) [hereafter "6 Wigmore"]; McCormick, *supra*, § 297, at 855; Fed. Rules of Evid., Rule 803, Advisory Committee Notes.

the statement was made when the excitement was rekindled; the declarant's emotional condition, including crying or sleep patterns; speech pattern of the declarant; declarant's physical condition (statements made during a period of injury or pain caused by the event are likely made during the stress of excitement caused by the event); age of the declarant; nature of the event; content of the statement; spontaneity; whether the statement was elicited by questions; explicit language; whether there are circumstantial guarantees of reliability (corroborating evidence); and the totality of the circumstances. J. Myers, *Hearsay Statements by the Child Abuse Victim*, 38 Baylor L. Rev. 775, 863-875.

B. A Spontaneous Statement is Important Evidence that Cannot be Replicated, and So the Requirement of Necessity is Satisfied

As in *Inadi*, there are sound reasons to find that unavailability of the declarant is not required when a statement is admitted under the spontaneous statement exception to the hearsay rule. Like in *Inadi*, the rule of necessity is satisfied by virtue of the fact that the out-of-court statement is important evidence that cannot be replicated even if the declarant testifies in court.

A spontaneous statement clearly has independent evidentiary significance. Unlike the former testimony at issue in *Roberts*, a spontaneous statement is not similar to live trial testimony. Rather, there is a significant evidentiary difference between spontaneous statements and trial testimony, so that the former is not merely a weaker substitute for the latter. Compare also *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972) [witness' testimony from first trial

introduced at trial; *Barber* v. *Page*, 390 U.S. 719 (1968) [witness' preliminary hearing testimony offered at trial].

Because of the context in which a spontaneous statement is made, the circumstances surrounding the statement, and concomitantly the reliability of the statement, cannot be duplicated. The statement is an unsolicited utterance made without consideration for its testimonial value.

In the same way that the position of co-conspirators vis a vis each other often changes by the time of trial, the relationship of a victim of child abuse and her abuser, when the abuser is a person known to the child, often changes between the time of the crime and trial. It is an indisputable fact that children frequently are ambivalent about identifying family members, friends, or acquaintances as perpetrators of abuse. But, in the heat of the moment following the crime, while the pain, the humiliation, and the fear of the abuse is still fresh, a child may make a spontaneous utterance regarding the abuse.

Not infrequently, however, when the delirium of the event has worn off, she[6] comes to comprehend the consequences of her actions -- she may have to go to court and testify; she may be removed from the home; she may cause the breakup and financial ruin of her family; and she may cause the incarceration of a person for whom she cares -- and she recants. See *Johnson* v. *State*, 732 S.W.2d 817, 823 (Ark. 1987); Summit, *The Child Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983). Thus, the child is likely to speak differently when under the stress of the event than she would when testifying on the witness stand.

Moreover, in child abuse cases in particular, the fact that the out-of-court statement was made near the time of the abuse may make it more credible than the victim's in-court testimony. Children frequently cannot recall for any significant period of time the details of their

6. For simplicity's sake, amici use the feminine pronoun when referring to child victims and the masculine pronoun when referring to prosecutors and doctors.

abuse. *State* v. *Edward Charles L.*, 398 S.E.2d 123, 132-133 (W. Va. 1990); see *People* v. *Jones*, 792 P.2d 643 (Cal. 1990). Thus, a spontaneous statement, made near the time of the abuse, will often be a more accurate statement of what occurred. Certainly, since the defense bar routinely argues that a child victim's testimony is tainted by law enforcement personnel, mental health professionals, child protective agency workers, and prosecuting attorneys, they cannot reasonably be heard to complain that the admission of a child's statement made before these people have extensive contact with the child is not more reliable than her subsequent testimony.[7]

As aptly noted by Professor Wigmore, a spontaneous statement is "*better than* is likely to be

7. "Indeed, common sense suggests that '[s]ome of the most powerful potential evidence . . . lies in the child's prior out-of-out statements. When a child first reveals that there has been sexual abuse, the content and manner of the revelation is often striking in its clarity and ring of truth.'" *State* v. *Robinson*, 735 P.2d 801, 812 (Ariz. 1987), quoting Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Social Issues 125, 133 (1984).

obtained from the same person upon the stand." 6 Wigmore, *supra*, § 1748, at 199 [emphasis added]. Hence, it has long been recognized that the superior trustworthiness of a spontaneous statement creates a necessity for resorting to it for unbiased testimony. *Ibid.*, citing, e.g., *Mobile & Montgomery R.R.* v. *Ashcraft*, 48 Ala. 15, 31 (1872) ["We regard these declarations as . . . more convincing . . . than the testimony of the persons themselves some time after the occurrence"].[8/]

The high degree of reliability of a spontaneous statement, particularly when the declarant is a child, significantly diminishes the importance of cross-examination; it is unlikely that even skillful cross-examination will adduce a persuasive repudiation of the prior statement. Indeed, as this Court has noted,

8. Professor Wigmore continued, "It follows that *death*, *absence*, or *other unavailability* of the declarant need never be shown under this exception -- a proposition never disputed." 6 Wigmore, *supra*, § 1748, at 199 [emphasis in original]. See also McCormick, *supra*, § 297, at 855.

> "The basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that *cross-examination would be superfluous*."

Idaho v. *Wright*, *supra*, 110 S. Ct. at 3149 [emphasis added].

For a number of reasons, then, a spontaneous statement, particularly one made by a child abuse victim, is likely to be more reliable and more probative than would be her reconstructed version of events given on the witness stand some months or years after the abuse occurred. At the very least, it is important evidence that cannot be reproduced. Either way, a requirement that the prosecution either produce the child or demonstrate her unavailability before her out-of-court spontaneous statement is admitted "is not likely to produce much

testimony that adds anything to the 'truth-determining process.'" *Inadi, supra*, 475 U.S. at 396.[9]

But, such a rule would impose a significant burden upon the People, and it would serve as a practical bar to the use of statements offered under a well-established hearsay exception. As in *Inadi*, a constitutional rule requiring a determination of availability each time the prosecution seeks to introduce a child's spontaneous statement necessarily would add another avenue of appellate review in these cases, thus imposing a substantial burden on the entire criminal justice system. See *Inadi, supra*, 475 U.S. at 398-399. Additionally, and more important, such a rule would require the prosecution to choose between foregoing the use of important evidence

9. As Wigmore has stated, "If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance) in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured." 5 Wigmore, *supra*, § 1420, at 252.

or subjecting the child to what well may be another traumatic and emotionally damaging ordeal.

If an unavailability rule applies, a prosecutor who desires to introduce a child victim's out-of-court statement will have three options.

He may produce the child. The likely result, of course, will be that the child will be cross-examined about painful and embarrassing issues in a courtroom setting in the presence of not only the defendant, but also the judge, the jury, counsel, and court personnel, and this experience may cause the child further lasting emotional harm:

> "Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination, facing the accused again, the official atmosphere in court, the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative."

Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1969).

Or, the prosecutor may forego using the child's out-of-court statements. This may well mean that the state will be forced to attempt to prove its case without the most probative evidence it possesses.

Finally, he may attempt to demonstrate the child's unavailability. But that attempt, even if successful, will require the child to be examined, either in court or by an expert witness.

For example, if a child is incompetent to testify as a witness, she is, as a practical matter, unavailable because she cannot be subjected to cross-examination. See, e.g., *Lancaster* v. *People*, 615 P.2d 720, 723 (Colo. 1980); *State* v. *Kuone*, 757 P.2d 289, 294-295 (Kan. 1988); *State* v. *Lanam*, 459 N.W. 2d 656, 659 (Minn. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 693; *State* v. *Deanes*, 374 S.E.2d 249, 259 (N.C. 1988), *cert. denied*, 490 U.S. 1101

(1989). A court may not make a finding of unavailability, however, unless the prosecution has produced the child for a competency examination and established incompetency. See e.g., *Deanes, supra*, at 259; *State* v. *Campbell*, 705 P.2d 694, 705 (Or. 1985); *State* v. *Ryan*, 691 P.2d 197, 203 (Wa. 1984).

Likewise, if the victim is one of the many children whose fear of testifying or of facing the defendant makes it psychologically impossible for her to proceed, she is unavailable. See *State* v. *Doe*, 719 P.2d 554, 557 (Wa. 1986); *State* v. *Sheppard*, 484 A.2d 1330, 1334-1337 (N.J. 1984). But, the court cannot make that finding unless the child has been examined either by an expert or by the judge and the court has determined that the potential psychological injury would render the child's testimony relatively impossible. See, e.g., *State* v. *Robinson*, *supra*, 735 P.2d at 813-814; *People* v. *Stritzinger*, 668 P.2d 738, 746-747 (Cal. 1983) *Miller* v. *State*, 531 N.E.2d 466, 468 (Ind. 1988).

Each of these three options carries a price, and the prosecutor will be faced with the difficult decision of determining which price to pay: the loss of probative evidence or the potential additional traumatization of the child victim.

The burdens imposed by an unavailability rule would exist even if it turned out that neither the prosecution nor the defense desired to examine the victim at trial. *Inadi, supra*, 475 U.S. at 398. As this Court has reasoned, under these circumstances, "it is difficult to see what, if anything, would be gained by a rule that requires the prosecution to make the declarant 'available.'" *Ibid.*[10/]

In sum, then, the reliability and the probative value of an out-of-court statement that satisfies the

10. In *Inadi*, the Court noted that the defendant's counsel apparently concluded that the absent declarant's testimony would not have been particularly helpful. The defendant could have demanded the declarant' presence, and the Compulsory Process Clause of the Sixth Amendment would have required his production, but no such request was made. *Inadi, supra*, 475 U.S. at 397-398; see *United States* v. *Quick*, 22 M.J. 722, 726 and 727 n. 4 (A.C.M.R. 1986), *aff'd*, 26 M.J. 460 (C.M.A. 1988).

foundational requirements for admission as a spontaneous statement is reliable evidence that cannot be replicated in court, and this is particularly true when the declarant is a child. Hence, consistent with *Inadi*, the necessity for resorting to this evidence is satisfied, and no showing of the declarant's unavailability should be required prior to the admission of her statement.

III

UNAVAILABILITY OF THE DECLARANT SHOULD NOT BE REQUIRED AS A CONDITION OF ADMISSIBILITY OF A CHILD VICTIM'S OUT-OF-COURT STATEMENT UNDER THE EXCEPTION TO THE HEARSAY RULE FOR STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS AND TREATMENT

A. The Exception for Statements Made for Purposes of Medical Diagnosis or Treatment

All jurisdictions make an exception to the hearsay rule for statements made with a view to treatment. Weinstein, *supra*, ¶ 803(4)[01], at 803-143. The scope of the exception varies considerably, however: some courts admit only statements of present symptoms; others have extended the rule to admit, in addition, statements that describe past symptoms and the nature and cause of the injury insofar as they bear on treatment. See *ibid.*

In its narrowest form, the exception, insofar as it permits a doctor to testify to a patient's out-of-court report of present symptoms, is closely related to the exception for spontaneous statements.[11/] It is grounded in

11. This scope of the exception has been accepted as a specific doctrine since the early 1800's, and for more than a hundred years prior to that time, it was accepted as an indefinite doctrine that did not distinguish clearly between this and the exception for spontaneous declarations. Wigmore, *supra*, § 1714, at 90-91, § 1747, at 196.

the recognition that a person's expressions of contemporaneous bodily feelings, pain or malady "are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence." *Bacon* v. *Charlton*, 7 Cush. 581, 586 (Mass. 1851), quoted in 6 Wigmore, *supra*, § 1719, at 103; see McCormick, *supra*, § 291, at 838-839.[12/]

The broadest scope of the exception is set forth in Rule 803(4) of the Federal Rules of Evidence, which has provided the model for the definition of the medical exceptions in the majority of American jurisdictions.[13/]

12. Despite occasional indications to the contrary, statements of present bodily conditions, because of the rationale underlying them, generally need not have been made to a physician to qualify for admission under this hearsay exception. McCormick, *supra*, § 291, at 838.

13. The following states have adopted Rule 803(4) verbatim or with only minor stylistic changes: Alaska Rules of Evid., Rule 803(4) (1979); Ariz. Rev. Stat. Ann. Rules of Evid., Rule 803(4) (1977); Ark. Unif. Rules of Evid., Rule 803(4) (1976); Colo. Rules of Evid., Rule 803(4) (1980); Del. Uniform Rules of Evid., Rule 803(4) (1980); Hawaii Rules of Evid., Rule 803(b)(4) (1981); Iowa Rules of Evid., Rule 803(4) (1983); *Drumm* v. *Commonwealth*, 783 S.W. 2d 380 (Ky. 1990); La. Code of Evid., Art. 803(4) (1989); Me. Rev. Stat. Ann., Rules of Evid., Rule 803(4) (1983); Miss. Rules of Evid., Rule 803(4) (1986); Mont. Rev. Codes Ann. § 93-3002, Rules of Evid., Rule 803(4) (1977); Neb. Rev. Stat. § 27-803(3) (1985); Nev. Rev. Stat. tit. 4, §

Under this rule, statements regarding not only present symptoms, but also statements of medical history and those regarding causation and fault, are admissible if the statements are reasonably pertinent to diagnosis or treatment.[14]

§ 27-803(3) (1985); Nev. Rev. Stat. tit. 4, § 51.115 (1971); N.M. Stat. Ann. Rules of Evid., Rule 803(4) (1976); N.C. Rules of Evid., Rule 803(4) (1984); N.D. Rules of Evid., Rule 803(4) (1977); Ohio Rules of Evid., Rule 803(4) (1980); Or. Evid. Code, Rule 804(4) (1982); S.D. Rules of Evid., §19-16-8 (1978); Tenn. Rules of Evid., Rule 803(4) (1990); Tex. Rules of Evid., Rule 803(4) (1983); Utah Rules of Evid., Rule 803(4) (1983); Wash. Rules of Evid., Rule 803(4) (1979); W. Va. Rules of Evid., Rule 803(4) (1985); Wis. Stat. Ann. § 908.03(4) (1974); Wyo. Rules of Evid., Rule 803(4) (1978).

The following states have adapted the federal rule in various ways: Fla. Stat. Ann. Evid. Code § 90.803(4) (1979); Idaho Rules of Evid., Rule 803(4) (1985); Ill. Rev. Stat. Criminal Code § 115-13 (1987); Mich. Rules of Evid., Rule 803(4) (1978); Minn. Stat. Ann. Evid. Rule 803(4) (1977); N.H. Rules of Evid., Rule 803(4) (1985); Okla. Stat. Ann. tit. 12, § 2803(4) (1978); R.I. Rules of Evid., Rule 803(4) (1987); Vt. Rules of Evid., Rule 803(4) (1983).

14. Federal Rule 803 states:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

" . . . .

"(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Two independent rationales support this exception. First, it is recognized that the patient's belief that an accurate and truthful statement is important to proper treatment ensures its reliability. See *United States* v. *Renville*, 779 F.2d 430, 436 (8th Cir. 1985); *United States* v. *Iron Shell*, 633 F.2d 77, 83-84 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). Additionally, it is acknowledged that a physician who views the patient's medical history, including cause and fault, as related to diagnosis and treatment would reasonably be expected to communicate this to the patient so as to assure a reliable response. McCormick, *supra*, § 292, at 840. And, as Professor Weinstein has recognized, "[a] fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription." Weinstein, *supra*, ¶ 803(4)[01], at 803-146. This principle acknowledges the fact that life and death decisions are made by physicians in reliance on the facts related by the patient, and thus they should have sufficient trustworthiness to be admissible in a court of law. *Iron Shell*, *supra*, at 84.[15]

15. In *Ohio* v. *Roberts*, *supra*, 448 U.S. 56, the Court stated that the reliability of business records comes from the fact that "records of regularly conducted activities cannot fulfil their function . . . unless they are accurate. Thus, the motive for accuracy is great, while the motive to falsify is virtually non-existent." *Id.* at 66.

Consistent with the two policy justifications supporting the rule, the courts have employed a two-part test for the admissibility of hearsay statements under this exception. First, the declarant's motive in making the statement must be consistent with the purposes of promoting diagnosis and treatment.[16] Second, the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis. *United States* v. *Iron Shell*, *supra*, 633 F.2d at 84; see also *Morgan* v. *Foretich*, 846 F.2d 941, 949 (4th Cir. 1988); *State* v. *Robinson, supra,* 735 P.2d at 809; *Stallnacker* v. *State*, 715 S.W.2d 883, 884 (Ark. App. 1986); *People* v. *Galloway*, 726 P.2d 249, 252-253 (Colo. App. 1986); *State* v. *Maldonado*, 536 A.2d 600, 602 (Conn. App. 1988).

It has been recognized by a number of courts that the cause of a condition is often relevant to

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The two-part rationale underlying the exception for purposes of medical diagnosis or treatment is analogous to that underlying the exception for business records: if a patient does not speak truthfully to her physician, and if the physician does not carefully consider those statements as they relate to a proper diagnosis and treatment, the purposes of seeking and dispensing medical care are thwarted.

16. If a child, because of her tender years, is unable to appreciate the doctor's role, her statements will not satisfy the foundational requirements for admission under this exception. See *W.C.L.* v. *People*, 685 P.2d 176, 181 (Colo. 1984).

diagnosing that condition and deciding upon a course of treatment. See, e.g., *United States* v. *Iron Shell*, *supra*, 633 F.2d at 84-85; *United States* v. *Iron Thunder*, 714 F.2d 765, 772-773 (9th Cir. 1983). The victim's statements often suggest to the doctor the nature of the problem, and information regarding what happened may provide guidelines for the physician's examination by pinpointing areas of the body to be examined more closely and narrowing the examination by eliminating other areas. See *Iron Shell*, *supra*, at 84.

Ordinarily, statements as to fault, including those identifying the victim's assailant, do not qualify as necessary for diagnosis or treatment. *United States* v. *Iron Shell*, *supra*, 633 F.2d at 84; Fed. Rules of Evid., Rule 803, Advisory Committee Notes. Statements of identity seldom are made for the purpose of promoting effective treatment, and physicians rarely have any reason to rely on statements of identity in treating or diagnosing a patient. *United States* v. *Renville*, *supra*, 779 F.2d at 436.

This general rule does not apply in many child abuse cases, however, because in many of these cases the abuser's identity is critical to effective diagnosis and treatment. The Eighth Circuit has explained this exception to the general rule as follows:

Child abuse involves not only physical abuse, but emotional and psychological injuries as well, and the nature and extent of a child's psychological injuries often depend upon the identity of the abuser. Additionally, physicians have a legal obligation to prevent an abused child from being returned to an environment in which she cannot be adequately protected from recurrent abuse, and this obligation is most immediate where the abuser is a member of the victim's household. Information that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment that includes removing the child from the home. When the physician makes clear to the victim that the inquiry into the abuser's identity is important to diagnosis and treatment and the victim manifests such an understanding, the victim's motivation to speak truthfully is the same as that which insures reliability when she recounts the chronology of events or details symptoms of somatic distress. Additionally, statements of identity to a physician by a child who has been abused by a family member are of a type physicians reasonably rely on in formulating a diagnosis and course of treatment. Admission of these statements, therefore, is fully consistent with the two-part rationale underlying the exception to the hearsay rule for

statements made for purposes of medical diagnosis or treatment. *United States* v. *Renville*, *supra*, 779 F.2d at 437-438.

This rule has been adopted by a number of jurisdictions.[17] Subsequent cases have noted that the reason for admitting statements regarding the perpetrator's identity may apply in some other limited circumstances.[18]

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17. E.g., *Morgan* v. *Foretich*, *supra*, 846 F.2d 941, 949-950; *United States* v. *Deland*, 22 M.J. 70 (C.M.A. 1986), *cert. denied*, 479 U.S. 856; *State* v. *Robinson*, *supra*, 735 P.2d at 810; *Stallnacker* v. *State*, *supra*, 715 S.W.2d at 884-885; *People* v. *Galloway*, 726 P.2d 249, 252-253 (Colo. App. 1986); *State* v. *Maldonado*, 536 A.2d 600, 603 (Conn. App. 1988), *app. denied*, 541 A.2d 1239 (Conn. 1988); *In re Rachel T.*, 549 A.2d 27, 34-35 (Md. App. 1988); *State* v. *Aguallo*, 350 S.E.2d 76, 80-81 (N.C. 1986); *Goldade* v. *State*, 674 P.2d 721, 722-728 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984); see also *Nelson* v. *Farrey*, 874 F.2d 1222, 1224-1229 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 835 (1990); *Drake* v. *State*, 761 P.2d 879, 882-883 (Okla. Cr. 1988); *State* v. *Ucero*, 450 A.2d 809, 814-815 (R.I. 1982).

18. In *United States* v. *Provost*, 875 F.2d 172, (8th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 170 (1989), the court admitted evidence regarding the victim's half-brother, who did not continuously reside with the child victim of sexual assault. *Id.* at 176-177. This ruling is consistent with the well-recognized fact that child abuse, and particularly sexual abuse, is frequently committed by persons who do not live with the child but who have recurring access to the child. See *People* v. *Jones*, *supra*, 792 P.2d 643.

In *State* v. *Moen*, 786 P.2d 111 (Or. 1990), the court admitted evidence regarding the son-in-law of the adult victim of a homicide. The statements made by the victim to her doctor before her murder, explaining her depression, directly related to her illness, and

B. A Statement Made for Purposes of Medical Diagnosis or Treatment is Important Evidence that Cannot be Replicated, and So the Requirement of Necessity is Satisfied

As with co-conspirator statements and spontaneous statements, there is good justification for concluding that the declarant need not be shown to be unavailable when her testimony is admitted under an exception to the hearsay rule for statements made for medical purposes. Here, too, the rule of necessity is satisfied by virtue of the fact that the out-of-court statement, particularly when the declarant is a child, is probative evidence that cannot be duplicated even if the declarant testifies in court.

Under the narrower view of the exception, which limits admission to statements regarding present symptoms, the analysis is virtually identical to that for spontaneous statements. First, the statement has independent

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the information was used to diagnose and treat that illness. Hence, her statements were made for the purpose of medical diagnosis or treatment. *Id.* at 118-121.

In addition, in sexual assault cases, the identity of the perpetrator may well be relevant to diagnosis and treatment if an examination of the perpetrator will assist in determining whether the victim may have a sexually transmitted disease. See *In re Rachel T.*, *supra*, 549 A.2d at 35. This would apply, of course, whether the victim is a child or an adult.

evidentiary significance, and thus it is not a weaker substitute for live testimony. Second, because the patient is describing her own physical sensations, the risks of misperception and faulty recollection are less than would be a subsequent recitation of recollected facts. And, third, much of the reliability of the statement is derived from the context in which the statement was made, particularly when the statement is made to a doctor. Accordingly, as Professor Wigmore has explained, the probability that the person's testimony on the stand will be in value equal or superior to the hearsay statement is small, and thus it is desirable to resort to the hearsay statement. 6 Wigmore, *supra*, § 1714, at 90.

Under the broadest view of the exception, the analysis is somewhat different. The conclusion, however, is the same.

The evidentiary value of a statement made for purposes of medical diagnosis or treatment differs significantly from trial testimony. Although both represent, for the most part, the declarant's recollection of past events, the circumstances under which that recollection is elicited differ, and the value of the out-of-court statement cannot be reproduced.

A child's motive for testifying and her motive for providing information to a doctor are wholly dissimilar. Simply stated, it is in a patient's selfish interest to be truthful with her physician. "Like the co-conspirator who does not tell knowing falsehoods during the course of the conspiracy because of his vested interest in its successful outcome, a person who is seeking relief from a physical ailment or injury does not intentionally mislead a listener whose effectiveness in responding depends upon the accuracy of the information he receives." *United States* v. *Quick, supra*, 22 M.J. at 726-727.

As discussed previously, however, by the time of trial, she undoubtedly will have an increased awareness of the ramifications of her statements. In spite of the oath, she may well believe that it could be detrimental to her own interest, as well as the interest of her family, to testify truthfully. *Ante,* at 19-20. Hence, her testimony is likely to be less honest than is her out-of-court statement, which was made in a more relaxed atmosphere and at a time when her sense of self-preservation was strongest.

Additionally, because of the circumstances under which a child's statement for purposes of medical treatment is made, the statement carries strong assurances of accuracy that cannot be duplicated even if the child

testifies at trial. Most commonly, the statement is made shortly after the offense occurred. See, e.g, *State* v. *Robinson, supra*, 735 P.2d at 804; *People* v. *Galloway, supra*, 726 P.2d at 251; *State* v. *Maldonado, supra*, 536 A.2d at 601. In every case, it will have been made closer to the time of the offense than would be her in-court testimony. And, because the doctor has a business duty to maintain patient records, the child's statement will be memorialized. Hence, although months or years may pass between the time of the offense and the time of trial, the statement will provide an accurate record of the child's perceptions at a time when the incident was fresh in her mind. Accordingly, the out-of-court statement will be superior in evidentiary quality to her testimony on the witness stand. See *United States* v. *Quick*, supra, 22 M.J. at 727.

A child's testimony in court will rarely, if ever, recapture the evidentiary significance of her statements made during the course of a medical examination. Stated otherwise, those statements are irreplaceable as substantive evidence. Moreover, given the rationales underlying the exception to the hearsay rule that permits their admission, they possess a high degree of reliability that renders it unlikely that cross-examination would adduce evidence that

persuasively undermines their value. Indeed, as the Seventh Circuit Court of Appeals has aptly stated,

> "[W]e should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication. There is no basis for believing that T's testifying would have enhanced the accuracy of the jury's determination."

Nelson v. *Farrey, supra*, 874 F.2d at 1230.

Accordingly, as in *Inadi*, a requirement that the prosecution either produce the child or demonstrate her unavailability before her out-of-court statement is admitted "is not likely to produce much testimony that adds anything to the 'truth-determining process.'" *Inadi, supra*, 475 U.S. at 396. As noted previously, however, such a rule would impose a substantial burden upon the People, and it would serve as a practical bar to the use of reliable hearsay evidence, *ante*, at 24-28, and this would be true even in a case in which neither the prosecution nor the defense wished to examine the declarant at trial, *Inadi, supra*, 475 U.S. at 399.

This Court has recognized that the states have a compelling interest in accurate fact-finding and effective law enforcement. *Bourjaily* v. *United States*, 483 U.S. 171, 182 (1987); *Ohio* v. *Roberts, supra*, 448 U.S. at 64. It has also recognized that the states have a strong interest in safeguarding the psychological well-being of children. *Maryland* v. *Craig, supra*, 110 S. Ct. at 3167; *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982). A requirement that the prosecution demonstrate a child's unavailability before her out-of court statements to her doctor can be introduced will thwart the states' efforts to protect both of those interests while doing little to assure the integrity of the fact-finding process. Accordingly, when, in a child abuse case, the foundational requirements for the admission of a statement under the exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment are met, "[a]ny marginal protection to the defendant by forcing the government to call as [a witness a child who is] available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine [the child], cannot support an unavailability rule." *Inadi, supra*, 475 U.S. at 399-400.

IV[19]

THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE PROSECUTION TO DEMONSTRATE PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS PRIOR TO THE ADMISSION OF EVIDENCE UNDER THE EXCEPTIONS TO THE HEARSAY RULE FOR SPONTANEOUS STATEMENTS OR STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

A. Reliability of an Out-of-Court Statement Can Be Inferred When It Falls Within a Firmly Rooted Hearsay Exception

As discussed previously, if the rule of necessity for admitting hearsay evidence is satisfied, the evidence may be admitted if it bears sufficient "indicia of reliability" to ensure accuracy in the fact-finding process. *Ohio* v. *Roberts, supra*, 448 U.S. at 65. This Court has declared that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with constitutional protection. *Roberts,*

19. As noted above, a hearsay statement may be admitted without violating the Confrontation Clause if it is both necessary and reliable. *Ante*, at 9-14. Although the question presented, as phrased by the petitioner, does not speak to this second requirement, amici respectfully ask this Court to address this point and to find that both the exception for spontaneous statements and that for statements made for purposes of medical diagnosis or treatment are firmly rooted, so that the reliability of evidence falling within them can be inferred without more.

supra, at 66. Thus, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ibid.*

The *Roberts* Court gave four examples of firmly rooted hearsay exceptions: dying declarations, cross-examined prior-trial testimony, public records, and business records. *Ohio* v. *Roberts*, *supra*, 448 U.S. at 66. These were not, however, intended to be the only exceptions classified as firmly rooted. Thus, *Inadi* added the co-conspirator exception to the list.

This Court has not identified specifically the material from which the foundations of a firmly rooted exception are to be built. In *Roberts*, however, the Court indicated that an exception is firmly rooted if it is such as to guarantee the reliability of virtually any evidence falling under that exception. *Ohio* v. *Roberts, supra*, 448 U.S. at 66, citing *Mattox* v. *United States, supra*, 156 U.S. at 244. Accordingly, as stated by one state supreme court, "the question of whether a hearsay exception is 'firmly rooted' does not turn upon how long the rule has been accepted but rather how solidly it is grounded on considerations of reliability and trustworthiness--the very reasons for the right to confrontation." *State* v. *Wyss*, 370 N.W.2d 745, 759 (Wis. 1985).

B. The Exception for Spontaneous Statements is Firmly Rooted

It has long been recognized that when a person is truly excited and she makes a statement about a concurrently or recently perceived event before having the opportunity to think through the possible consequences of her utterance, it is likely to be a reliable statement. See *People* v. *Farmer*, 765 P.2d 940, 951 (Cal. 1989). The exception to the hearsay rule for spontaneous statements was followed in English common law, and American cases employing the exception date back to the nineteenth century. *Puleio* v. *Vose*, 830 F.2d 1197, 1206 (1st Cir. 1987), *cert. denied*, 485 U.S. 990 (1988).[20/] "To borrow a

20. According to Professor Wigmore,
"The limits of the exception may be elusive and the practice in different courts may vary. But that the core and substance of such an exception is universally accepted cannot be open to doubt. [¶] Historically, this conscious recognition appears in England before the end of the 1700s . . . though it is only within the last few generations that it is firmly and unquestionably established. Such is, however, the inherent congruity of the doctrine that we are still able to resort to the earliest precedent for a succinct and accurate statement of the principle."

phrase succinctly employed in the Court's . . . recent refinement of the principle, the special evidentiary treatment accorded to spontaneous exclamations, is, we think, 'steeped in our jurisprudence.'" *Puleio, supra,* 830 F.2d at 1206, citing *Bourjaily* v. *United States, supra,* 483 U.S. at 183.

Recently this Court said,

> "[I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the 'excited' utterance exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that *therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy* and that cross examination would be superfluous."

Idaho v. *Wright*, *supra*, 110 S. Ct. at 3149 [emphasis added].

6 Wigmore, *supra*, § 1747, at 195.

Stated otherwise, the foundational requirements for admission of a hearsay statement under the spontaneous statement exception are themselves the guarantees of the statement's reliability. These requirements virtually assure that there is minimal chance that the statement will be inaccurate due to the declarant's misperception, fabrication, or faulty recall. (See *ante*, at 16-23.

Accordingly, the First Circuit Court of Appeals has declared, "In our view, it is indisputable that use of such spontaneous exclamations falls within one of the most deeply embedded of hearsay exceptions." *Puleio* v. *Vose*, *supra*, 830 F.2d at 1206. A number of other courts have agreed. E.g., *Haggins* v. *Warden*, 715 F.2d 1050, 1056-1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); *United States* v. *Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *United States* v. *Cree*, 778 F.2d 474, 502 (8th Cir. 1985) (Oliver, J., dissenting); *State* v. *Jeffers*, 661 P.2d 1105, 1123 (Ariz. 1983), *cert. denied*, 464 U.S. 865 (1983); *People* v. *Gallego*,

802 P.2d 169, 198 (Cal. 1990); *Harrison* v. *United States*, 435 A.2d 734, 736 (D.C. App. 1981); *People* v. *Grover*, 451 N.E.2d 587, 591 (Ill. App. 1983); *State* v. *Porter*, 281 S.E.2d 377, 381 n. 1 (N.C. 1981); *State* v. *Bawdon*, 386 N.W.2d 484, 487 (S.D. 1986); *State* v. *Palomo*, 783 P.2d 757, 578 n. 3 (Wash. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 80 (1990).

The historical reasons for believing that spontaneous statements are inherently reliable have withstood the test of time. *People* v. *Farmer, supra,* 765 P.2d at 951. Accordingly, amici submit these statements fall within a firmly rooted exception to the hearsay rule, and a court need not independently inquire into their reliability.

C. The Exception for Statements Made for Purposes of Medical Diagnosis or Treatment is Firmly Rooted

The exception to the hearsay rule for purposes of medical diagnosis or treatment lacks the storied lineage

of that for spontaneous statements. The exception, as broadened to admit not only statements of present and past symptoms, but also statements of medical history and cause, has been widely accepted for slightly more than a decade.[21] See Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939, enacting Federal Rules of Court, Rule 803; *ante,* at 31 and n. 13.

As discussed previously, however, strong assurance of the reliability of statements made for medical purposes derives from the likelihood that the patient

21. The exception for the admission of statements for the purpose of medical treatment, insofar as it permits a doctor to relate a patient's report of present symptoms, has long been recognized. *State* v. *Wyss*, *supra*, 370 N.W.2d 745 at 758; Wigmore, *supra*, § 1714, at 90. Because the patient is describing her own physical sensations, the risks of misperception and of faulty recollection are minimal. Louisell & Mueller, *supra*, § 444, at 593. In addition, her interest in obtaining proper treatment gives her every reason to speak truthfully and carefully. *Ibid.* Accordingly, there is scarcely any dissent from the belief that a patient's recital of present symptoms and complaints for the purpose of diagnosis and treatment are inherently trustworthy, McCormick, *supra*, § 292, at 839-840; Gard, Jones on Evidence, § 10:7, at 270 (6th ed. 1972), and this exception is said to be among the most solidly founded within the hearsay rules, R. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257, 257.

understands the seriousness of the matter, and she realizes that the effectiveness of the treatment she receives will depend largely upon the accuracy of the information she provides. Accordingly, she is motivated to be truthful and careful, so that risks of insincerity and ambiguity are likewise minimal. *Ante*, at 31-33; see also *Idaho* v. *Wright, supra*, 110 S. Ct. at 3149. In addition, the doctor's interest in obtaining accurate and truthful information ensures that there is minimal risk of misperception on his part, that any ambiguities that might occur in his conversation with the declarant will be cleared away, and that there will be virtually no risk of misrecollection on his part. *Ante*, at 33.

The majority of jurisdictions[22] thus have recognized that the foundational requirements for admission of a statement made for purposes of medical diagnosis or treatment are themselves the guarantees of the statement's reliability: if the victim's motives are

22. See footnote 13 and accompanying text.

consistent with the purpose of the rule, and if it is reasonable for the physician to rely on the information in diagnosis or treatment, the statement is inherently reliable and trustworthy. Accordingly, although the exception, as set forth in Rule 803(4) of the Federal Rules of Evidence and similar state statutes, is relatively new in the jurisprudence, it is solidly grounded on the considerations of reliability underlying the right to confrontation and, hence, it is properly classified as "firmly rooted" within the meaning of *Ohio* v. *Roberts*, *supra*, 448 U.S. 56. See *State* v. *Maldonado*, *supra*, 536 A.2d 600, 604; *State* v. *Wyss*, *supra*, 370 N.W.2d at 759; Gard, Jones on Evidence, *supra*, § 10:7, at 270; Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L.Rev. 19, 44 (1985).

CONCLUSION

For the foregoing reasons, amici respectfully request that the decision of the Fourth District Appellate Court of the State of Illinois be affirmed.

DATED:

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